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**No. 10743** Vol

IN THE

2388

**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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AARON FERER & SONS, a co-partnership,

Appellant,

vs.

RICHFIELD OIL CORPORATION, a corporation,

Appellee.

---

**VOLUME I.**

(Pages 1 to 464 Inclusive)

**TRANSCRIPT OF RECORD**

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division.

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**FILED**

JUL 15 1944

PAUL P. O'BRIEN,  
CLERK



No. 10743

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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AARON FERER & SONS, a co-partnership,

Appellant,

vs.

RICHFIELD OIL CORPORATION, a corporation,

Appellee.

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VOLUME I.

(Pages 1 to 464 Inclusive)

## TRANSCRIPT OF RECORD

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in *italics* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

CARL B. STURZENACKER,  
PHILIP N. KRASNE,  
505 Taft Building,  
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Los Angeles 28, Calif.

For Appellee:

ROBERT E. PARADISE,  
WILLIAM J. DE MARTINI,  
555 South Flower Street,  
Los Angeles, Calif.

In the Superior Court of the State of California  
in and for the County of Los Angeles

No. 1718-H

No. 465936

AARON FERER & SONS, a Co-Partnership,  
Plaintiff,

vs.

RICHFIELD OIL CORPORATION, a Corporation,  
Defendant.

COMPLAINT  
DECLARATORY JUDGMENT.

Plaintiff complains and alleges:

I.

That at all times herein mentioned, plaintiff was and now is a co-partnership, comprised of Morris Ferer, Ester Peggy Ferer and Robert Irving Ferer, doing business under the fictitious name and style of Aaron Ferer and Sons, and having its principal place of business in the County of Los Angeles, State of California.

II.

That at all times herein mentioned, the Defendant was and now is a corporation duly organized under the laws of the State of Delaware, and having *it's* principal place of business in the County of Los Angeles, State of California.

III.

That on or about the 17th day of January, 1941, plaintiff and defendant entered into a contract in writing, a true and correct copy of which is attached hereto, marked Ex-

hibit "A", and made a part of this Complaint. That there was attached to said written contract, a map, which said map was referred to in said written contract as Exhibit A. That said map indicated the location of certain refinery and producing facilities and equipment located on the said premises described in said written contract, and further indicated with red markings, certain of such refinery and producing facilities and equipment which were to be excluded from the conveyance provided for in said written contract. That said map is omitted from Exhibit "A" attached to this complaint, for the reason that it is bulky; that defendant has in *it's* possession and attached to *it's* executed copy of said written contract, a true and correct copy of said map.

#### IV.

That there is located on the premises described in said written contract, approximately thirty-seven oil wells. That said oil wells are now and for several years last past have been inoperative. That there is contained in said oil wells certain metal, to-wit: oil well casing and pipe.

#### V.

That an actual controversy and dispute exists between the parties hereto with respect to said written contract, and more particularly with respect to whether or not the conveyance to plaintiff by defendant of refinery and producing facilities and equipment, includes the metal, to-wit: the casing and pipe contained in said oil wells and whether or not plaintiff has the right under said written contract to dismantle and remove such casing and pipe from said oil wells and from said premises.

#### VI.

Defendant claims and contends that said casing and pipe

in said oil wells is not included in the conveyance from defendant to the plaintiff provided for in said written contract, and that plaintiff has no right to dismantle or remove same or any portion thereof from said oil wells and/or from said premises. Plaintiff claims and contends that under said written agreement, defendant conveyed to plaintiff and granted plaintiff the right to dismantle and remove all refinery and producing facilities and equipment on the premises, except certain refinery and producing facilities and equipment specifically reserved. That the casing and pipe contained in said oil wells constitutes producing equipment. That said casing and pipe was not specifically reserved in said written contract and that plaintiff therefore acquired from defendant under said written contract, all of said casing and pipe and has the right to dismantle and remove same from said wells and from said premises.

Wherefore, plaintiff, as a party to said written contract, and a party interested, desires a declaration of the rights and duties of plaintiff and defendant with respect to the subject matter of this complaint, together with such other relief as may be requisite and proper to carry out or enforce such declaratory judgment.

PHILIP N. KRASNE,

CARL B. STURZENACKER,

Attorneys for Plaintiff.

Exhibit "A" omitted. Same as Exhibit "A" attached to amended complaint.

[Verified.]

[Endorsed]: Filed Jul. 8, 1941. L. E. Lampton, County Clerk; by M. Samuels, Deputy.



[Title of Superior Court and Cause.]

NOTICE OF FILING OF PETITION FOR REMOVAL AND BOND AND NOTICE OF APPLICATION FOR AN ORDER GRANTING REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION, & PETITION FOR REMOVAL.

To the Plaintiff, Aaron Ferer & Sons, a copartnership,  
and to Philip N. Krasne and Carl B. Sturzenacker,  
its attorneys:

You and Each of You Will Please Take Notice that on July 14, 1941, at the hour of 3:00 o'clock P.M. of said day, the Defendant, Richfield Oil Corporation, a corporation, will file in the office of the Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, its petition for removal of the above entitled cause from the Superior Court of the State of California, in and for the County of Los Angeles, the court in which the above entitled action is now pending, to the District Court of the United States in and for the Southern District of California, Central Division, and a bond on removal, conditioned in accordance with law, copies of which said petition and bond are hereto annexed and served upon you; and

You and Each of You Will Please Take Further Notice that on July 15, 1941, at the hour of 9:30 A.M.,

or as soon thereafter as counsel may be heard, the Defendant, Richfield Oil Corporation, a corporation, will bring on for hearing said petition for removal in Department 35 thereof, and will move the above entitled Court in said Department 35 for an order approving said bond on removal, copy of which is hereto annexed, and will apply for an order by the said Court removing said cause to the District Court of the United States in and for the Southern District of California, Central Division, in pursuance of said petition for removal.

Said motion will be made upon the grounds stated in said petition, and will be based upon this notice and upon all the files and records in said cause.

Dated: July 14, 1941.

Robert E. Paradise

ROBERT E. PARADISE,

Attorney for Defendant,

Richfield Oil Corporation.

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL TO THE DISTRICT  
COURT OF THE UNITED STATES FOR THE  
SOUTHERN DISTRICT OF CALIFORNIA,  
CENTRAL DIVISION.

To the Honorable Superior Court of the State of California, in and for the County of Los Angeles:

Your Petitioner, Richfield Oil Corporation, a corporation, respectfully shows to this Honorable Court as follows:

1. Your Petitioner herein, Richfield Oil Corporation, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and was so organized and existing as a corporation under the laws of the State of Delaware at the time of the commencement of the above entitled action, and was at said time and now is a citizen and resident of the State of Delaware.

2. That the complaint herein alleges that Plaintiff, Aaron Ferer & Sons, is a co-partnership, comprised of Morris Ferer, Ester Peggy Ferer, and Robert Irving Ferer. That each of said persons, to-wit, Morris Ferer, Ester Peggy Ferer, and Robert Irving Ferer, are, and at the time of the commencement of the above entitled action were, citizens and residents of a state of the United States, to-wit, as your Petitioner is informed and believes, and therefore alleges, citizens and residents of the State of California. That your Petitioner is informed and believes, and therefore alleges, that at the time of the commencement of this action, and at all times since, Plaintiff,

Aaron Ferer & Sons, a co-partnership, was and now is a citizen and resident of the State of California.

3. The above entitled action was commenced against the Petitioner in the Superior Court of the State of California in and for the County of Los Angeles and is now pending in said court, and is an action of civil nature of which the District Court of the United States in and for the Southern District of California, Central Division, has original jurisdiction.

4. That the above entitled action is one brought by the said Plaintiff against your Petitioner, Richfield Oil Corporation, as Defendant, upon a written contract, dated January 17, 1941, under the terms of which said contract Plaintiff alleges that the Plaintiff acquired from the Defendant all of the oil well casing and pipe contained in approximately 37 oil wells located upon the premises described in the written contract, and that the Plaintiff has the right to dismantle and remove said oil well casing and pipe from said wells and from said premises. That the said premises described in said written contract comprise a parcel of real property containing approximately 400 acres, under which said parcel there existed at the time of the commencement of the above entitled action, and now exists, a reservoir of oil, belonging to your Petitioner, of an approximate value in excess of Three Million (\$3,000,000.00) Dollars, which said oil, or a substantial portion thereof, may be produced from the oil wells described in said Plaintiff's complaint now existing upon said premises. That under the provisions of Section 3233 of the Cali-

fornia Public Resources Code and the rules and regulations of the California Division of Oil and Gas, said oil well casing and pipe cannot be removed from said wells without the abandonment of said wells in the manner provided by law. That if Plaintiff were entitled to remove the oil well casing and pipe from said wells the cost to Defendant of installing additional casing and pipe in said wells, if such installation could be accomplished after the abandonment of such wells, would be a sum in excess of Fifty Thousand (\$50,000) Dollars. That if Plaintiff were entitled to remove the oil well casing and pipe from said wells, and if Defendant should be unable, because of said abandonment, to install additional casing and pipe in said wells, the cost to Defendant of drilling the same number of additional wells on said land, together with the cost of the casing and pipe to be installed therein, and the installation thereof, would be an amount in excess of Seven Hundred Fifty Thousand (\$750,000.00) Dollars. That accordingly at the time of the commencement of this action, and at all times since, the value of said wells, with said oil well casing and pipe installed therein, as the same now exists, and which said wells are capable of producing oil as aforesaid, was and is an amount in excess of \$50,000.00.

That in the complaint in the above entitled action Plaintiff seeks a declaration that Plaintiff is entitled to said oil well casing and pipe and is entitled to dismantle and remove said casing and pipe from said oil wells and from said premises, and Plaintiff seeks further "such other

relief as may be requisite and proper to carry out and enforce such declaratory judgment". That in said complaint Plaintiff alleges that Defendant claims and intends that Plaintiff has no right to dismantle or remove said oil well casing and pipe or any portion thereof from said oil wells or from said premises; that Plaintiff has asserted to Defendant that the damages to Plaintiff resulting from Defendant's preventing Plaintiff from dismantling and removing said oil well casing and pipe from said wells and premises are in an amount in excess of Twenty Thousand (\$20,000.00) Dollars.

That, as aforesaid, the controversy between the Plaintiff and your Petitioner is of a civil nature, at law or in equity, and involves a sum in excess of Three Thousand (\$3,000.00) Dollars, exclusive of interest and costs.

5. That said complaint sets forth, as between Plaintiff and your Petitioner herein, a controversy entirely between citizens of different states, to-wit, between the Plaintiff co-partnership and the co-partners thereof, all citizens of the State of California, and the Petitioner herein, a citizen of the State of Delaware.

6. A copy of the complaint and summons in the above entitled matter were served upon the Petitioner in the State and County of Los Angeles on July 8, 1941, and your Petitioner has not yet appeared in answer to the complaint and summons served upon it, nor filed any pleading in said action, nor has the time to plead, answer, or demur to the same allowed under the statutes of the State of Cali-



fornia and the laws and rules of practice in this court expired, and the time for Petitioner to appear and plead herein will not expire subsequent to July 18, 1941.

7. Your Petitioner has made due written notice to Plaintiff of the time and place of the filing of this Petition and a bond on removal, and of application to the above entitled court for removal of this cause to the District Court of the United States, Southern District of California, Central Division, pursuant to this petition for removal.

8. There is presented herewith a good and sufficient bond as by statute in such cases made and provided, which said bond is in the penal sum of One Thousand (\$1,000.00) Dollars and is conditioned upon the entering into the District Court of the United States in and for the Southern District of California, Central Division, within thirty (30) days from the date of the filing of this petition, of a certified copy of the record of this action in said District Court of the United States for the Southern District of California, Central Division, and for the payment of all costs which may be awarded by said Court if the said District Court of the United States shall determine or hold that this suit was wrongfully or improperly removed thereto.

Wherefore, your Petitioner prays that this Court proceed no further herein except to accept and approve the bond presented herewith and to make the order of removal as required by law, and to order that no further proceed-

ings be taken herein and to direct a transcript of the record herein to be prepared, made, and certified by the Clerk of this Honorable Court as provided by law to the said District Court of the United States in and for the Southern District of California, Central Division, in the manner and form as provided by law.

Robert E. Paradise

ROBERT E. PARADISE,

Attorney for Defendant,

Richfield Oil Corporation.

[Verified.]

## MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION TO REMOVE

### I.

An action may be removed from the State Court to the District Court of the United States, where the citizenship of the diverse parties thereto, and the matter in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

28 U. S. C. A., Section 71 (Judicial Code, Section 28 Amended).

### II.

If an action is one of which the United States District Court can rightfully take jurisdiction, then upon the filing of a petition for removal in due time with a sufficient bond the action is in law removed and the State Court

in which it is pending loses jurisdiction to proceed further and all subsequent proceedings in that court are void.

28 U. S. C. A., Section 72 (Judicial Code, Section 29).

Madisonville Traction Co. vs. St. Bernard Mining Co., 196 U. S. 239; 49 Law Edition 462, 464.

### III.

The jurisdictional amount may appear in the petition for removal. The jurisdictional amount is determined by the amount in controversy, i. e., the value of the property which the plaintiff is seeking to recover or the value which the defendant stands to lose if the plaintiff is successful.

Crockett vs. Overfield, 22 Fed. Supp. 915.

Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irrigation Co., 158 Fed. 137, 139.

Morrow vs. Mutual Casualty Co., 20 Fed. Supp. 193.

Deland vs. Hewitt Soap Co., Inc., 27 Fed. Supp. 482.

Studebaker vs. Salina Water Works Co., 195 Fed. 164.

Southern Cash Register Co. vs. National Cash Register Co., 143 Fed. 659.

Received copy of the within Notice this 14th day of July, 1941. Philip N. Krasne, Attorney for Plaintiff.

[Endorsed]: Filed Jul. 14, 1941. L. E. Lampton, County Clerk; by B. B. Burris, Deputy.

[Title of Superior Court and Cause.]

### BOND ON REMOVAL

Know All Men by These Presents: That the Hartford Accident and Indemnity Company, a corporation duly organized and existing under the laws of the State of Connecticut, and authorized to transact business in the State of California, is held and firmly bound unto the above named Plaintiff in the sum of One Thousand and no/100 (\$1,000.00) Dollars, for which payment well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents.

The Condition of the Above Obligation Is Such That, Whereas, said Richfield Oil Corporation, a Corporation, has filed its petition in the Superior Court of Los Angeles County, State of California, for the removal of a certain cause therein pending, wherein said Richfield Oil Corporation, a Corporation, is Defendant, and said Aaron Ferer and Sons, a Copartnership, is Plaintiff, to the District Court of the United States, Southern District of California, Central Division.

Now, Therefore, if the said Richfield Oil Corporation, a Corporation, shall enter in the said District Court of the United States, Southern District of California, Central Division, within thirty (30) days from the date of filing said petition, a certified copy of the record in said suit and shall well and truly pay all costs that may be awarded by said District Court of the United States, Southern District of California, Central Division, if said Court shall hold that said suit was wrongfully or improperly removed there-to, then this obligation shall be void; otherwise to remain in full force and virtue.

Signed, Sealed and Dated this 11th day of July, 1941.

HARTFORD ACCIDENT AND  
INDEMNITY COMPANY,

By Dick W. Graves [Seal]

(DICK W. GRAVES)

Attorney-in-Fact.

State of California,

County of Los Angeles,—ss.

On this 11th day of July, in the year 1941, before me, Ida Fuhrmeister, a Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared Dick W. Graves, known to me to be the Attorney-in-Fact of the Hartford Accident and Indemnity Company, the Corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the Corporation therein named, and ....he acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Notarial Seal)

Ida Fuhmeister

Notary Public in and for the County of Los Angeles,  
State of California.

My Commission Expires April 26, 1942.

Bond approved July 15, 1941. Kurtz Kauffman, Court Commissioner of Los Angeles County.

Bond approved Jul. 15, 1941. George A. Dockweiler, Judge.

[Endorsed]: Filed Jul. 14, 1941. L. E. Lampton, County Clerk; by B. B. Burris, Deputy.

In the Superior Court of the State of California, in and for the County of Los Angeles.

July 15, 1941. Present, Hon. George A. Dockweiler, Judge Presiding. No. 465936. Department 35.

AARON FERER & SONS, ETC.,

Plaintiff,

vs.

RICHFIELD OIL CORPORATION, ETC.,

Defendant.

Petition and Bond of Defendant, Richfield Oil Corporation, etc., for Removal to the United States District Court in and for the Southern District of California, Central Division, comes on for hearing; Robert E. Paradise appearing as attorney for the defendant. Said petition is granted. Bond approved.

---

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL OF CAUSE TO THE  
UNITED STATES DISTRICT COURT IN AND  
FOR THE SOUTHERN DISTRICT OF CALI-  
FORNIA, CENTRAL DIVISION.

The Defendant, Richfield Oil Corporation, a corporation, prior to the expiration of the time within which said Defendant was required to answer or otherwise plead to Plaintiff's complaint, having filed herein and presented to this Court for approval and acceptance a good and sufficient bond, conditioned as prescribed by law, and with good and sufficient surety, and having filed and presented to this Court its petition for removal of this cause from the

Superior Court of the State of California in and for the County of Los Angeles to the District Court of the United States for the Southern District of California, Central Division, and it appearing to the Court that due notice of the filing of said petition and bond for removal has been given to the adverse party prior to the filing of said petition and bond, and it appearing to the Court that this is a proper case for the removal of said cause to the District Court of the United States.

Now, Therefore, It Is Hereby Ordered and Adjudged that the said petition and bond are hereby accepted, and said bond is hereby approved and said petition for removal is hereby granted; and

It Is Further Ordered and Adjudged that this cause be and it hereby is removed to the District Court of the United States in and for the Southern District of California, Central Division, and the Clerk of this Court is hereby directed to prepare and make a transcript of the record herein and certify and transmit the same to the District Court of the United States in and for the Southern District of California, Central Division, in the manner and form as provided by law ,and that all further proceedings in this Court be stayed.

Dated this 15th day of July, 1941.

GEORGE A. DOCKWEILER,  
Judge.

[Endorsed]: Filed Jul. 15, 1941. L. E. Lampton,  
County Clerk; by J. D. John, Deputy.

State of California

County of Los Angeles—ss.    No. 465936

I. L. E. Lampton, County Clerk and ex-officio Clerk of The Superior Court in and for the County and State aforesaid, do hereby certify the foregoing copies of documents and orders consisting of:

Complaint, Notice of filing and hearing petition and Petition for Removal, Bond on Removal, Minute Order granting petition for removal, written Order for Removal to the District Court of the United States for the Southern District of California (Central Division), and Affidavit of Service by Mail, in the action of

Aaron Ferer & Sons, a Co-Partnership vs. Richfield Oil Corporation, a Corporation, to be full, true and correct copies of all of the original documents on file and/or of record in this office in said action to date.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 6th day of August, 1941.

L. E. LAMPTON,

County Clerk and ex-officio Clerk of the Superior Court  
of the State of California, in and for the County of  
Los Angeles.

By C. G. Albrecht, Deputy.



District Court of the United States for the Southern District of California (Central Division)

No. 1718-H

AARON FERER & SONS, a Co-Partnership,  
Plaintiff,

vs.

RICHFIELD OIL CORPORATION, a Corporation,  
Defendant.

CERTIFIED COPY OF RECORD ON REMOVAL.

[Endorsed]: Filed Aug. 12, 1941.

---

[Title of District Court and Cause.]

AMENDED COMPLAINT  
DECLARATORY JUDGMENT.

Plaintiff complains and alleges:

I.

That at all times herein mentioned, plaintiff was and now is a co-partnership, comprised of Morris Ferer, Ester Peggy Ferer and Robert Irving Ferer, doing business under the fictitious name and style of Aaron Ferer And Sons, and having *it's* principal place of business in the County of Los Angeles, State of California.

II.

That at all times herein mentioned, the defendant was and now is a corporation duly organized under the laws of the State of Delaware, and having *it's* principal place of business in the County of Los Angeles, State of California.

## III.

That the original complaint now on file herein was first filed in the Superior Court of the State of California in and for the County of Los Angeles in action No. 465936 of said Superior Court; that said action was ordered removed to the above entitled court by said Superior Court on the 15th day of July, 1941.

## IV.

That on or about the 17th day of January, 1941, plaintiff and defendant entered into a contract in writing, a true and correct copy of which is attached hereto, marked Exhibit "A" and made a part of this amended complaint by reference, by the terms of which defendant sold and conveyed to plaintiff all of the refinery and producing facilities and equipment located on the premises therein described except for certain items thereof specifically reserved unto defendant. That there was attached to said written contract as Exhibit A thereof, a map, showing the location of all of the said refinery and producing facilities and equipment, and further showing with red markings, the items thereof which were specifically reserved unto the defendant as hereinabove alleged. That said map is omitted from Exhibit "A" attached to this amended complaint, for the reason that it is bulky; that defendant has in *it's* possession and attached to *it's* executed copy of said written contract, a true and correct copy of said map.

## V.

That concurrently with the execution of said written contract, plaintiff paid to defendant the monetary consideration provided for in Paragraph 1 thereof, to-wit: the sum of Twenty-two thousand (\$22,000.00) Dollars. That immediately after the execution of said written contract, plaintiff took possession of the premises therein described

and of the refinery and producing facilities and equipment located thereon; that ever since the execution of said written contract, plaintiff has been engaged in the dismantling and removing of said refinery and producing facilities and equipment from the said premises in accordance and compliance with the terms, covenants and conditions set forth in said written contract; that plaintiff is still in possession of said premises and of said refinery and producing facilities and equipment; that in addition to the \$22,000.00 paid by plaintiff to defendant as hereinabove alleged, plaintiff has incurred an expense in the dismantling and removal of materials from said premises and in disposing of debris on said premises, all as required of plaintiff by the terms of said written contract in an amount of approximately Twenty Five Thousand (\$25,000.00) Dollars.

## VI.

That there is located on the premises described in said written contract, approximately thirty seven oil wells; that said oil wells are now and for several years last past have been idle and inoperative; that plaintiff is informed and believes and upon such information and belief alleges that the derricks and tubing and rods were removed from said wells several years prior to the execution of said written contract; that there is located in each of said wells certain producing equipment and/or metal, to-wit: pipe in varying lengths and sizes comprising a portion of what is commonly known in the oil industry as the "production string" and/or as "casing"; that said pipe for convenience, is hereinafter referred to as "casing"; and that each of said oil wells is shown on the map attached to and made a part of the written contract and that none of said wells

or any of the producing equipment contained therein are circled in red to indicate that they were reserved to defendant under the terms of said written contract.

## VII.

That an actual controversy and dispute exists between the parties hereto with respect to said written contract, and more particularly with respect to whether or not the conveyance to plaintiff by defendant of the refinery and producing facilities and equipment on the premises described in said written contract includes said casing and whether or not plaintiff has the right under said written contract to remove said casing from said oil wells and from said premises.

## VIII.

Defendant claims and contends that said casing in said oil wells is not included in the conveyance from defendant to the plaintiff provided for in said written contract, and that plaintiff has no right to remove same or any portion thereof from said oil wells and/or from said premises. Plaintiff claims and contends that under said written contract defendant sold and conveyed to plaintiff all of the refinery and producing facilities and equipment on the premises, except certain items thereof specifically reserved: that said conveyance from defendant to plaintiff includes all metal on the premises; that said casing is metal and is producing equipment; that said casing was not specifically reserved to defendant by the terms of said written contract and that plaintiff has the right, under the terms of said written contract, to remove said casing from said oil

wells and from said premises and to retain same as part of the producing equipment purchased by plaintiff from defendant.

### IX.

That plaintiff has at all times fully done and performed all of the stipulations, conditions and agreements to be performed by plaintiff under said written contract, except that plaintiff has not yet removed all of the refinery and producing facilities and equipment from said premises, and as to the portion not yet removed, plaintiff is diligently proceeding with the removal thereof. That plaintiff is, and at all times since the execution of said written contract, has been ready, willing and able to remove said casing in a manner that will comply with all of the rules and regulations, laws, orders and requirements of the Division of Oil and Gas of the State of California, and of all other governmental authorities and in strict compliance with all of the terms, covenants, agreements and provisions of said written contract.

### X.

That defendant has threatened to prevent plaintiff from removing said casing from said oil wells and from said premises and has further advised plaintiff, and plaintiff believes, that even if this court declares that plaintiff has the right to remove said casing from said oil wells and said premises under the terms of said written contract, defendant will, nevertheless, still prevent plaintiff from doing so; that unless defendant is restrained from interfering with plaintiff's removal of said casing, plaintiff will suffer irreparable loss; that plaintiff has no speedy or adequate remedy at law in that it would be extremely difficult

to ascertain the amount of pecuniary compensation which would offer adequate relief; that until and unless plaintiff is allowed to proceed and remove said casing from said oil wells, it will be impossible to ascertain what quantity thereof can be removed, the salvagable value thereof, or the cost of such removal.

As A Further, Separate And Distinct Cause Of Action against defendant, plaintiff alleges:

### I.

Plaintiff repeats and re-alleges by reference, as fully and completely as if herein set forth at length, all of the allegations contained in Paragraphs I, II, III, IV and VI of the plaintiff's first cause of action.

### II.

That on or about the 27th day of June, 1941, defendant notified plaintiff that defendant would not deliver to plaintiff, or permit plaintiff to remove from the premises above referred to, any of said casing, and said defendant totally repudiated the said contract insofar as it related to said casing.

### III.

That plaintiff has paid the consideration provided for in said written contract, and has at all times done and performed all of the stipulations, conditions and agreements to be performed by plaintiff under said written contract; that plaintiff is and at all times since the execution of said written contract, has been ready, willing and able to remove said casing in a manner that will comply with all of the rules and regulations, laws, orders and requirements of the Division of Oil and Gas of the State of California, and of all other Governmental authorities and

in strict compliance with all of the terms, covenants and agreements and provisions of said written contract.

IV.

That by reason of the premises, plaintiff has been damaged in the sum of Fifty Thousand (\$50,000.00) Dollars.

Wherefore, plaintiff, as a party to said written contract and a party interested, desires and prays for a declaration of the rights and duties of plaintiff and defendant with respect to the subject matter of this amended complaint, and in the event that this court declares that plaintiff has the right to remove said casing from said oil wells and said premises, then plaintiff prays further that defendant be restrained from interfering with plaintiff's removal thereof from said oil wells and said premises, for costs of suit herein, and for such other and further relief as may be requisite and proper to carry out and enforce such declaratory judgment.

Plaintiff further prays that in the event this court should determine that plaintiff is not entitled to the declaratory judgment prayed for under the first cause of action herein, that then plaintiff be given a money judgment against defendant in the sum of Fifty Thousand (\$50,000.00) Dollars, for costs of suit herein, and for such other and further relief as may be fair and proper.

PHILIP N. KRASNE,  
CARL B. STURZENACKER,  
By Philip N. Krasne  
Attorneys for Plaintiff.

EXHIBIT A.

This Agreement made and entered into this 17th day of January, 1941, by and between Richfield Oil Corporation, a Delaware corporation, hereinafter referred to as "Seller," and Aaron Ferer & Sons, a co-partnership, hereinafter referred to as "Buyer",

Witnesseth:

Whereas, Seller is the owner of a certain parcel of real property in Santa Barbara County, California, more particularly described as:

That certain parcel of real property situated in the County of Santa Barbara, State of California, more particularly described as follows:

"Beginning at a pipe known as point "M" of John P. Black's survey of property of the Soladino Land Company, and running thence S. 83°23' E. 2335.1 feet to a pipe; thence N. 41°00' E. 5492.9 feet to a pipe; thence N. 64°21' W. 3197.7 feet to a post marked "M3"; thence S 41°00' W. 3564 feet to a pipe known as "M"2"; thence S 25°31' W. 1676.5 feet to a post marked "M 1" thence S. 1°06' E. 1056.0 feet to the point of Beginning. Containing 400 acres.

A deed describing said property being recorded in Book 170 of Deeds, Page 595, Official Records of Santa Barbara County.

on which parcel of property are located various refinery and producing facilities and equipment, and

Whereas, Buyer desires to purchase such equipment and facilities subject to the exceptions hereinafter set



forth and Seller is willing to sell the same to Buyer upon condition that Buyer dismantle and remove the same in accordance with the terms, covenants and conditions hereinafter contained:

1. In consideration of the payment by Buyer to Seller concurrently herewith of the sum of Twenty Two Thousand Dollars (\$22,000.00) receipt whereof is hereby acknowledged by Seller and in consideration of the performance by Buyer of the terms, covenants and provisions hereinafter contained, Seller covenants and agrees to sell to Buyer, subject to the exceptions hereinafter provided, all of the equipment and facilities now located on said land above described together with the pipe lines running from said land to a point adjacent to the railroad track one-half mile west of said land, and including the boiler, boiler house, two corrugated iron tanks, pump and loading rack located at said point. Said equipment and facilities so to be sold include generally all pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors, tanks, metal and lumber now located on said land, all subject to the exceptions hereinafter provided. It is expressly understood and agreed that the following items of equipment and facilities located on said land above described are excepted from the foregoing and shall not be included in said sale nor shall the same be dismantled or removed by Buyer:

(a) 12 Cottrell type dehydrators, 3' x 8', belonging to Petroleum Rectifying Company;

(b) That certain water pump and the water storage facilities and water piping which services the Superintendent's house and cow barn;

(c) Superintendent's house (PR-1494), garage (PR-1479), frame house (PR-17318), and barn (PR1495);

(d) Six shell stills and two extra still bottoms including connections which are affixed thereto up to and including the first flange in the piping hook-up. (Previously sold to O. C. Field Gasoline Company).

(e) Brick foundations for said stills and still bottoms.

(f) Six tanks, Nos. PR-29230—Capacity 55,000 barrels

29231	"	55,000 barrels
29238	"	5,700 "
29239	"	10,050 "
29240	"	30,190 "
29241	"	37,250 "

and major suction and discharge oil pipe lines connecting such tanks approximately as indicated in red on the map attached hereto and marked Exhibit "A".

(g) Approximately 400' of 6" pipe line connecting to tank PR-29230 now being used by Camite Co.; Buyer, however, to have option of removing such line and replacing the same with 3" pipe line in as good quality and condition.

(h) Gas pipe lines connecting wells on the land above described to the superintendent's house (PR-1494).

(i) Certain equipment heretofore sold to Mid-Coast Oil Company consisting generally of brick, pipe tubes, return bends, structural steel, valves, pumps, engines and fittings, a list of which shall be furnished by Seller to Buyer upon request.

All of the foregoing equipment and facilities excluded from sale to Buyer herein (excepting the items heretofore sold to Mid-Coast Oil Company, as aforesaid) are indicated in red on the map attached to this agreement and marked Exhibit "A".

(2) Buyer agrees at its sole cost and expense to perform and

form the following work / in connection therewith shall supply all work, labor, machinery, equipment, materials and supplies, including fuel, water and electricity necessary for the performance of Buyer's work and services hereunder. Such work shall include the dismantling, removal and disposition of all equipment and facilities to be purchased by Buyer hereunder, as above provided, the removal from the property and the disposition thereof in a manner authorized by law of all oil, water and other sediment now existing in the various tanks to be purchased by Buyer hereunder, and the filling in and leveling off of all ditches and pits created by Buyer's work in removing pipe or other equipment. In addition, Buyer shall dispose of all debris (and the brick comprising the foundations under the stills remaining after the sale of a portion of such brick to the O. C. Field Gasoline Company) resulting from the performance of Buyer's work, by placing such debris and brick in the washed out portions of the creek running through the portion of the land on which the refinery equipment is now located, which disposition shall be performed in such manner that the normal course of the stream shall not be restricted. In addition, Buyer shall install a barbed wire fence, adequate for the protection of cattle, around the two large sumps on the north side of such creek. In addition, Buyer shall remove from said land all equipment, facilities

and other property now located on said land excepting only the items expressly excluded under the provisions of paragraph 1 hereinabove and in addition shall leave the land in a safe and clean condition; provided, however, that Buyer shall not be required to dismantle or remove concrete buildings or foundations located on the portion of the land now occupied by the refinery equipment.

In connection with the removal by Buyer of the loading rack, boilers and other equipment located at the railroad track one-half mile west of said land and the pipe lines connecting therewith, Buyer shall restore to their original condition the lands upon which said loading rack and other equipment and pipe lines are located, all in accordance with the provisions of that certain lease dated April 1, 1929, between Standard Oil Company of California, as Lessor, and Pan American Petroleum Company (the predecessor of Seller herein), as Lessee.

3. Buyer shall commence the performance of the foregoing work promptly after the execution of this agreement and shall complete the same not later than six (6) months following the date of this agreement.

4. Buyer expressly covenants and agrees that all of said work to be performed by Buyer shall be performed to the satisfaction of Seller and in strict compliance with all rules, regulations and other requirements of the County of Santa Barbara, State of California, and of any other governmental authorities, and including, but without limiting the generality of the foregoing, the Fire Warden and the Fish and Game Commission.

5. Buyer agrees to protect the land above described and all improvements and equipment located thereon, and the land owned by the Standard Oil Company of California (on which is now located the loading rack at the rail-

road station and the pipe lines connecting therewith), and the land owned by the Camite Company on which is located a portion of said pipe lines, and Richfield Oil Corporation, and Standard Oil Company of California, and the Casmite Company against any and all claims of laborers, mechanics and material men, and against all charges, liens and encumbrances of every kind and character arising out of or in connection with the performance by Buyer of any of Buyer's work or services hereunder, and to indemnify Richfield Oil Corporation and Standard Oil Company of California and the Camite Company and their successors and assigns of and from any and all loss, cost, damage or expense arising out of or in connection with any such claim, charge, lien or encumbrance.

6. Buyer covenants and agrees to indemnify and hold Seller and its successors and assigns harmless of and free from any and all claims, liabilities, obligations, and causes of action of every kind and nature whatsoever for injury to or death of persons, including Seller's employees, and/or damage to or destruction of property, including Seller's property and property owned by any other persons, firms or corporations, arising out of or in connection with or resulting from any and all acts or omissions of Buyer or Buyer's employees in connection with the performance by Buyer of any of the work or services hereinabove provided for.

7. Buyer covenants and agrees further to place in effect immediately and to maintain in effect at all times during the term hereof, at Buyer's sole cost and expense, the following insurance with responsible insurance carriers:

(a) Workmen's Compensation insurance covering all persons employed by Buyer in connection with the

work and services to be performed under the provisions of this agreement;

(b) Public Liability insurance in amounts of not less than \$25,000.00 for injury to or death of one person and \$50,000 for injury to or death of more than one person in any one accident;

(c) Property Damage insurance in the stated amount of \$25,000.00 for any one accident;

(d) Automotive Public Liability insurance in amounts of not less than \$25,000.00 for injury to or death of one person and \$50,000.00 for injury to or death of more than one person in any one accident; and

(e) Automotive Property Damage insurance in the Stated amount of \$5,000.00.

Such policies shall be written by insurance companies satisfactory to Seller. Certificates issued by said insurance companies issuing said insurance policies shall be deposited with Seller, which certificates shall provide that ten (10) days written notice shall be given to Seller prior to any cancellation of or material change in any such policy.

8. This agreement shall be personal to the Buyer and shall not be assigned by said Buyer, either voluntarily or involuntarily by operation of law without first securing the written approval thereto by Seller.

9. Buyer agrees to and does hereby accept full and exclusive liability for the payment of any and all taxes and contributions levied or assessed against Seller or Buyer for unemployment insurance and for old age retirement benefits, pensions, and annuities imposed by the government of the United States and by the government of any state of the United States which are measured by the wages, salaries, or other remuneration paid to persons

employed by Buyer in connection with work Buyer is required to perform and have performed under the terms of this agreement.

10. Buyer accepts full and complete responsibility for the return, payment and discharge of all property taxes on the equipment and facilities to be purchased by Buyer hereunder for the year 1941-42 and Buyer covenants and agrees to indemnify and reimburse Seller for any such taxes levied or assessed against Seller.

11. Buyer shall pay to Seller the amount of any and all taxes levied or assessed by any governmental authority in connection with the sale, delivery or removal of said equipment and facilities, expressly including but without limiting the generality of the foregoing, the amount of the California Retail Sales Tax applicable thereto; provided, however, that should Buyer purchase the same for resale, Buyer shall execute and deliver to Seller a certificate of resale in the form prescribed by the California Retail Sales Tax Act and by the regulations applicable thereto.

12. Commencing on the date of execution of this agreement, all risk of loss of or damage to all equipment and facilities to be purchased by Buyer hereunder shall be borne solely by Buyer.

13. Upon completion by Buyer, strictly in the manner hereinabove provided, of all of Buyer's duties, liabilities and obligations hereunder, Seller shall execute and deliver to Buyer a Bill of Sale, covering all equipment and facilities to be purchased by Buyer hereunder; which said Bill of Sale shall be in general terms only inasmuch as no inventory of such equipment and facilities is in existence.

It is expressly understood and agreed that Seller makes no warranties whatsoever, either express or implied, with

respect to the quantity, amount or size of any of the facilities or equipment to be purchased by Buyer hereunder or with respect to the condition or fitness of any of such equipment or facilities.

It is expressly understood and agreed that Buyer shall not be entitled to receive payment from Seller for any of Buyer's work hereunder and that the execution and delivery by Seller of said Bill of Sale, as aforesaid, shall constitute full compensation to Buyer for its work and services.

14. In the event that Buyer shall not have completed the removal of all of said equipment and facilities and performance of Buyer's work as provided in paragraph 2 hereinabove at the expiration of six (6) months following the date of this agreement, Buyer shall pay to Seller a rental for the use of said land at the rate of Fifty Dollars (\$50.00) per month until completion of such removal and of Buyer's work; provided that Buyer's use of the land shall be limited to use for the purpose of performing the work to be performed by Buyer under the provisions of paragraph 2 hereinabove.

In Witness Whereof, the parties hereto have executed this agreement the day and year first hereinabove written.

RICHFIELD OIL CORPORATION

By H. H. KELLY (Signed)

Attest R.C.S.

AARON FERER & SONS, a co-partnership,

By Morris Ferer (Signed)

Attest Helen Lipsman (Signed)

[Verified.]

[Endorsed]: Filed Oct. 24, 1941.



[Title of District Court and Cause.]

NOTICE OF MOTION

To Plaintiff and to Philip N. Krasne, Esq. and Carl B. Sturzenacker, Esq., Attorneys for Plaintiff, 505 Taft Building, Los Angeles, California:

Please Take Notice that the motion of defendant Richfield Oil Corporation to dismiss the amended complaint herein will be brought on for hearing before the District Court of the United States for the Southern District of California, Central Division, on the 17th day of November, 1941, at the opening of Court on that date or as soon thereafter as counsel can be heard, which said motion will be made upon the grounds stated in said motion and will be based upon this motion and upon all the records and files in the above entitled cause.

Dated: November 6, 1941.

ROBERT E. PARADISE

WILLIAM J. DeMARTINI

By Robert E. Paradise

Attorneys for defendant Richfield Oil Corporation.

[Endorsed]: Filed Nov. 6, 1941.

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[Title of District Court and Cause.]

MOTION TO DISMISS AMENDED COMPLAINT

To the Honorable United States District Court above named:

Defendant Richfield Oil Corporation moves the Court as follows:

I.

To dismiss the amended complaint and both causes of action thereof on the ground that the amended complaint fails to state a claim against Richfield Oil Corporation upon which relief can be granted for the following reason:

That the contract attached as Exhibit "A" to the amended complaint does not by its terms provide for the sale by defendant to plaintiff of the casing installed in any of the wells located upon the premises therein referred to, nor does such contract give to plaintiff the right to remove such casing from any of such wells.

## II.

To dismiss the alleged first cause of action on the ground that such alleged first cause of action fails to state a claim for specific performance for the following reason:

That it appears from the amended complaint herein that plaintiff seeks a decree of specific performance of plaintiff's alleged right to dismantle and remove casing and pipe from the oil wells located upon the premises described in the amended complaint and that the said contract attached to the amended complaint as Exhibit "A" is not specifically enforceable.

Dated: November 6, 1941.

ROBERT E. PARADISE

WILLIAM J. DeMARTINI

By Robert E. Paradise

Attorneys for defendant Richfield Oil Corporation.

[Endorsed]: Filed Nov. 6, 1941.

Received copy of the within this 6 day of Nov., 1941.  
Phil Krasne, Carl B. Sturzenacker, Attorneys for Plaintiff.

At a stated term, to-wit: The September Term, A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 17th day of November in the year of our Lord one thousand nine hundred and forty-one.

Present:

The Honorable: Harry A. Hollzer, District Judge.

No. 1718-H Civil.

Aaron Ferer & Sons, etc.,

Plaintiff,

vs.

Richfield Oil Corporation, a corporation,

Defendant.

This cause coming on for hearing motion of defendant to dismiss amended complaint pursuant to notice filed November 6, 1941, Philip N. Krasne and Carl B. Sturzenacker, Esqs., appearing as counsel for the plaintiff; Robert E. Paradise, Esq., appearing as counsel for the defendant:

Attorney Paradise argues in support of motion and Attorney Krasne argues in opposition to motion. It is ordered that the cause as to the said motion stand submitted.

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS:—

JUDGE HOLLZER—Monday, Dec. 29, 1941.

It appearing that defendant has moved to dismiss plaintiff's amended complaint and also to dismiss the first cause of action therein; and

It further appearing that the within entitled suit arises out of a certain written contract, a copy of which is attached to said amended complaint; and

It further appearing that by the first count of said amended complaint plaintiff seeks declaratory relief, more particularly, seeks a decree adjudging that under the terms of said contract the defendant sold and conveyed to plaintiff the casing in the oil wells on defendant's land described in said contract, also adjudging that plaintiff is entitled to remove said casing from said wells and premises, and also adjudging that defendant be restrained from interfering with plaintiff's removal of said casing; and

It further appearing from the terms of said contract that defendant owned the refinery and producing facilities and equipment located on said land, that plaintiff desired to buy such equipment and facilities, subject to certain exceptions more particularly set forth in said contract, that defendant was willing to sell the same upon the condition that plaintiff should dismantle and remove the same in accordance with the terms set forth in said contract; and

It further appearing from the terms of said contract that defendant thereby agreed to sell to plaintiff, subject to said exceptions, ALL of the equipment and facilities located on said land, together with the pipe lines running from said land to a certain point, and including the boiler, boiler house, two corrugated iron tanks, pump and loading

rack located at said point, said equipment and facilities thereby sold to include generally all pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors, tanks, METAL and lumber located on said land; and

It further appearing from the terms of said contract, more particularly, paragraph one thereof, that certain specifically enumerated and described items of equipment and facilities were expressly excepted as not being sold to plaintiff; and

It further appearing from the terms of said contract that the casing in the oil wells was not enumerated or described among the items of equipment and facilities thus expressly excepted from said sale; and

It further appearing from the terms of said contract that plaintiff agreed at its sole expense to perform certain work, and that such work should include, among other things, the dismantling, removal and disposition of ALL equipment and facilities to be purchased by them, also the filling in and leveling off of all ditches and pits created by their work in removing pipe or other equipment; also that in addition plaintiff should remove from said land ALL equipment, facilities AND OTHER PROPERTY located on said land, EXCEPTING ONLY the items expressly excluded under the provisions of paragraph one of said contract; also that all work to be performed by plaintiff should be performed in strict compliance with all rules, regulations and other requirements of the county of Santa Barbara, the state of California and of any other governmental authorities; and

It further appearing from the terms of said contract that upon completion by plaintiff of all its duties, liabilities and obligations thereunder, defendant was required to execute and deliver to plaintiff a bill of sale covering ALL equipment and facilities to be purchased by plaintiff there-

under, which bill of sale should be in GENERAL terms only, inasmuch as no inventory of such equipment and facilities was in existence; and

It further appearing from the affidavit of one H. H. Kelly, filed herein on behalf of defendant, and from the statement made by defendant's counsel in open court, that defendant has notified plaintiff that the former contends that it did not sell to plaintiff said casing, also contends that plaintiff is not entitled to remove said casing, and has also notified plaintiff that defendant intends to and will prevent plaintiff from removing said casing; and

It further appearing that by the second count of said amended complaint plaintiff seeks damages against defendant for its alleged breach of the aforementioned contract; and

It further appearing from the statement made by defendant's counsel in open court that said contract was drafted and prepared by defendant;

The Court concludes that under the terms of said contract the defendant sold and conveyed to plaintiff the casing in the oil wells on defendant's land described in said contract.

The Court further concludes that upon the face of the pleadings it appears that defendant has wrongfully breached said contract, this conclusion, however, being reached without prejudice to the right of defendant to answer the amended complaint and establish such defense as it may have thereto.

The Court further concludes that the damages arising from such breach of contract pertain to the sale and delivery of personal property, and that plaintiff is not entitled to declaratory or equitable relief herein.

[Endorsed]: Filed Dec. 29, 1941.]

At a stated term, to-wit: The September Term, A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 29th day of December in the year of our Lord one thousand nine hundred and forty-one.

Present:

The Honorable: Harry A. Hollzer, District Judge.

No. 1718-H Civil.

Aaron Ferer & Sons, a co-partnership,

Plaintiff,

vs.

Richfield Oil Corporation, a corporation,

Defendant.

For the reasons set forth in the Memorandum of Conclusions this day filed, it is ordered that defendant's motion to dismiss the amended complaint be denied, also that defendant's motion to dismiss the first count of said amended complaint be sustained without leave to amend, and that defendant serve and file its answer to the second count of the amended complaint on or before January 12, 1942.

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[Title of District Court and Cause.]

#### ANSWER TO AMENDED COMPLAINT.

Whereas, by order of the above entitled Court made and entered on December 29, 1941, the defendant's motion to dismiss the first cause of action of said amended complaint was sustained without leave to amend; for answer to the second cause of action of the amended complaint defendant denies and alleges as follows:

## I.

Answering paragraph I of the second cause of action of the amended complaint:

A. Answering paragraph I of the first cause of action as realleged in paragraph I of the second cause of action, defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

B. Answering paragraph IV of the first cause of action of the amended complaint as realleged in paragraph I of the second cause of action of the amended complaint, defendant admits that on or about the 17th day of January, 1941, plaintiff and defendant entered into a contract in writing, a copy of which is attached to the amended complaint and marked Exhibit "A," and defendant admits further that defendant has in its possession and attached to its executed copy of said written contract, a true and correct copy of the map referred to in said contract as Exhibit "A" thereto.

Defendant denies each and every other allegation of paragraph IV of the first cause of action of the amended complaint as realleged in paragraph I of the second cause of action of the amended complaint and in this connection defendant alleges that it has not sold or conveyed to plaintiff all or any of the refinery or producing facilities or equipment located on the premises therein described, as alleged in the amended complaint, but that by the terms of said contract, defendant merely agreed to sell to plaintiff certain of the facilities and equipment located on said premises as described in said contract; and defendant alleges that the subject matter of said contract was the particular facilities and equipment (subject to certain stated exceptions therefrom) located upon the surface of said



premises and did not include any of the casing or pipe installed in said oil wells.

C. Answering paragraph VI of the first cause of action of the amended complaint as realleged in paragraph I of the second cause of action of the amended complaint, defendant admits that there are located on the premises described in the written contract thirty-two (32) oil wells and admits that said wells are now and have for several years last past been idle and have not been operated for the production of oil therefrom; and in this connection defendant alleges that said wells are now capable, and during said period of several years last past were capable, of being operated for the production of oil therefrom. Defendant admits that the derricks and tubing and rods were removed from said wells during the year preceding the date of execution of said written contract between plaintiff and defendant. Defendant admits that there are now installed in said wells certain strings of casing and pipe in varying lengths and sizes. Defendant admits that none of said wells was circled in red on the map attached to said written contract and alleges that the subject matter of said written contract was the items of equipment and facilities (subject to certain stated exceptions therefrom) located on the surface of the premises described in said contract, as shown on said map, and did not include any subsurface equipment of the nature of the casing and pipe installed in said wells and that there was therefore no occasion for circling in red on said map any property of the nature of subsurface equipment not so included within the subject matter of said written contract. Defendant admits that none of the producing equipment located on the surface of the premises in connection with said oil wells was circled in red for the reason that such surface equipment comprising boilers, tanks and other miscellane-

ous surface equipment was included within the subject matter of said written contract and was not excluded therefrom. Defendant alleges that the casing and pipe installed in said wells was not indicated or shown on said map attached to the written contract and therefore could not be circled in red on said map. Defendant alleges that said map did not add to the subject matter of the contract any items of facilities or equipment not shown in red on such map but that said map was merely illustrative of certain of the exceptions as stated in the contract from the subject matter of the contract, to wit, the facilities and equipment located upon the surface of the premises.

Except as herein admitted, defendant denies each and every allegation of said paragraph VI of the first cause of action of the amended complaint as realleged in paragraph I of the second cause of action of the amended complaint.

## II.

Answering paragraph II of the second cause of action of the amended complaint, defendant admits that on or about the 27th day of June, 1941, defendant mailed to plaintiff a letter dated June 27, 1941, a true copy of which is attached hereto and marked Exhibit "A." Except as herein admitted, defendant denies each and every allegation of paragraph II of the second cause of action of the amended complaint.

## III.

Answering paragraph III of the second cause of action of the amended complaint, defendant admits that plaintiff paid to defendant the sum of Twenty-two Thousand Dollars to be performed by plaintiff under said written contract. Defendant denies that plaintiff has at all times done or performed all of the stipulations, conditions or agreements

to be performed by plaintiff under said written contract and in this connection defendant alleges that plaintiff is in default under the terms and provisions of said contract in that plaintiff has failed:

(1) To remove from said premises certain quantities of brick now located on said premises;

(2) To remove from said premises certain tanks now located on said premises; and

(3) To remove from said premises and to dispose of quantities of oil, water and other sediment existing in various tanks located on said premises;

all as required by the provisions of said written contract dated January 17, 1941.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff is and at all times since the execution of said written contract has been ready, willing and able to remove said casing in a manner that will comply with all of the rules and regulations, laws, ordinances and requirements of the Division of Oil and Gas of the State of California and of all other governmental authorities.

Except as hereinabove admitted, defendant denies each of the allegations of paragraph III of the second cause of action of the amended complaint.

#### IV.

Answering paragraph IV of the second cause of action of the amended complaint, defendant denies that plaintiff has been damaged in the sum of Fifty Thousand Dollars (\$50,000.00), or in any other sum whatsoever.

For a Separate, Further and Distinct Answer and Defense and by Way of a First Cause of Action of Counterclaim or Cross-Complaint, Defendant Alleges:

## I.

That on or about January 17, 1941, plaintiff and defendant orally agreed to the sale by defendant to plaintiff, upon certain terms and conditions and for the sum of Twenty-two Thousand Dollars (\$22,000.00), of certain producing and refining facilities and equipment which were located upon the surface of certain premises owned by defendant. That the parties to said agreement did not intend that the subject matter of said agreement of sale should include any casing or pipe installed in any of the wells located upon said premises, which casing and pipe were not of the nature of surface facilities or equipment but were and are installed and cemented in the ground down to an average depth of approximately fourteen hundred (1400) feet. That to evidence said agreement the plaintiff and defendant executed a written contract dated January 17, 1941, a copy of which is attached to the amended complaint herein and marked Exhibit "A" hereto.

That defendant is informed and believes and therefore alleges that plaintiff at and prior to the time of the execution of said written contract did not intend to purchase the casing or pipe installed in any of the oil wells located upon said premises or intend to do or perform the abandonment work on such wells in the manner required by Section 3233 of the California Public Resources Code which would be necessary in connection with the removal from such wells of the casing or pipe installed therein.

That at no time, either before or after the execution of said written contract, did defendant intend to sell to plaintiff the casing or pipe installed in any of the oil wells located upon the premises. That said premises are owned in fee by defendant. That said wells were drilled by defendant's predecessor in interest during the period from

1916 to 1925 to depths ranging from Thirteen Hundred Fifty (1350) feet to Forty-two Hundred (4200) feet for the purpose of producing oil from a pool underlying said premises. That the production of oil from said wells was discontinued on or about October, 1925, because of a decreased market value at such time for such oil. That at the time of the cessation of such production activities the reservoir of oil underlying said premises had not been exhausted and that at such time there remained and now remains a reservoir of oil underlying said premises valued at approximately Three Million Dollars (\$3,000,000.00), which reservoir is owned by defendant. That none of said wells have ever been abandoned in the manner provided by the Statutes of the State of California or in any other manner. That during the year preceding the date of the execution of said contract dated January 17, 1941, defendant removed from said wells the derricks and tubing and rods installed therein, which removal was deemed advisable because of the worn condition thereof. At the time of the removal of such derricks, tubing and rods, the casing and pipe in such wells was left in said wells and the wells were each capped at the surface thereof in order that such wells might in the future be opened and re-entered for the production of oil therefrom. That at all times herein mentioned it was and now is the intention of the defendant to produce oil from said wells at such time as the need and demand for oil of the quality contained in said reservoir shall make such production desirable. That no casing can be removed from any oil well in California without abandonment of such well (including the plugging of the same with cement) under the provisions of Section 3233 of the Public Resources Code of the State of California. That it is physically impossible to produce oil from any well which has been abandoned in accordance

with the provisions of Section 3233 of the California Public Resources Code. That if said thirty-two (32) wells on said premises were abandoned it would be necessary for defendant to drill and install casing in thirty-two (32) additional wells. That the cost of drilling and installing casing in wells on said premises to the same depth as the present thirty-two (32) wells thereon would be an average sum of not less than Fifteen Thousand Dollars (\$15,000.00) per well or an aggregate sum of not less than Four Hundred Eighty Thousand Dollars (\$480,000.00) for thirty-two (32) wells.

## II.

That in the preparation of said written contract dated January 17, 1941, the parties thereto inadvertently and by mutual mistake omitted to state that the subject matter thereof was limited to such producing and refining facilities and equipment (subject to the exceptions therein stated) which were located on the surface of said premises and that the subject matter did not include the casing or pipe installed in any of the oil wells located upon said premises. That in said respect, the written contract dated January 17, 1941, fails to express the intention and oral agreement of the parties thereto.

That plaintiff did not contend or assert that plaintiff had the right, under said written contract dated January 17, 1941, to purchase the casing and pipe installed in said wells until approximately one (1) month prior to the commencement of this action and that accordingly defendant had no knowledge of plaintiff's contention until such time.

## III.

That defendant has at all times fully done and performed all of the terms, covenants, provisions, conditions and agreements to be performed by defendant under said written contract dated January 17, 1941, between the parties hereto, a copy of which is attached to the amended complaint herein and marked Exhibit "A" thereto, excepting that defendant has not executed or delivered to plaintiff a bill of sale covering any equipment or facilities to be purchased by plaintiff under such contract, nor has defendant transferred to plaintiff title to any such equipment or facilities, all as provided in paragraph 13 of said written contract, for the reason that plaintiff has not completed in the manner provided in said contract all of plaintiff's duties, liabilities and obligations thereunder, which said completion was expressly in said paragraph 13 made a condition precedent to the execution and delivery of such bill of sale and transfer of title.

For a Separate, Further and Distinct Answer and Defense and by Way of a Second Cause of Action of Counterclaim or Cross-Complaint, Defendant Alleges:

## I.

Defendant herein realleges all of the allegations of paragraph I of defendant's first cause of action of counterclaim or cross-complaint as fully as though herein set forth at length.

## II.

That in the preparation of said written contract dated January 17, 1941, the defendant inadvertently and by mis-

take omitted to state that the subject matter thereof was limited to such producing and refining facilities and equipment (subject to the exceptions therein stated) which were located on the surface of said premises and that the subject matter did not include the casing or pipe installed in any of the oil wells located upon said premises. That in said respect the written contract dated January 17, 1941, fails to express the intention and oral agreement of the parties thereto.

That defendant is informed and believes and therefore alleges that at the time of the execution of said written contract dated January 17, 1941, plaintiff knew or suspected that defendant did not intend to sell to plaintiff the casing or pipe installed in any of the oil wells located upon said premises and that defendant intended that the subject matter of said written contract be limited to such producing and refining facilities and equipment (subject to the exceptions therein stated) which were located on the surface of said premises; and that plaintiff knew or suspected that said written contract dated January 17, 1941, failed in such respect referred to above to express the intention and oral agreement of the parties thereto.

That plaintiff did not contend or assert that plaintiff had the right, under said written contract dated January 17, 1941, to purchase the casing and pipe installed in said wells until approximately one (1) month prior to the commencement of this action and that accordingly defendant had no knowledge of plaintiff's contention until such time.



III.

Defendant here realleges all of the allegations contained in paragraph III of defendant's first cause of action of counterclaim or cross-complaint as fully as though herein set forth at length.

Wherefore, defendant prays that plaintiff take nothing by its complaint; that said written contract of January 17, 1941, be reformed to expressly provide that the subject matter thereof is limited to the items of facilities and equipment therein described (subject to the exceptions therein stated) which are located upon the surface of said premises and that said subject matter does not include the casing or pipe installed in the oil wells located upon said premises; and that this action be dismissed with prejudice and with costs taxed in favor of the defendant.

Robert E. Paradise

Robert E. Paradise

Wm. V. DeMartini

Wm. V. DeMartini

Attorneys for Defendant, Richfield Oil Corporation, 555  
South Flower Street, Los Angeles, California.

EXHIBIT "A"

June 27, 1941

Aaron Ferer & Sons

5585 East 61st Street

Los Angeles, California

Gentlemen:     Atten: Mr. Morris Ferer

In your letter of June 13th, 1941 you state that it was your impression that under the agreement between us,

dated January 17, 1941, you were to have the right to salvage the casing from the various wells located upon our Casmalia property and requested our reply as to whether we would consent to your removing such casing from the wells. You again requested a written reply in your letter of June 18th.

Although we have had various discussions of this matter with you and your attorneys during the past week, we find we have neglected to make a written reply of our position as requested by you. Accordingly we reiterate our understanding and position as stated to you in the conference held on June 20th, between you and Messrs. Montgomery and Paradise and myself.

We will not consent to your removing any of the casing from any of the wells on our property. The contract does not cover or relate to the casing in the wells nor was it ever the intention that such wells be abandoned or any of the casing taken out of the wells as a part of the salvaging operations of other equipment which you are conducting on our Casmalia property. Had we intended that your work include the pulling of the casing from such wells and the abandonment of the same, the contract would have contained various provisions concerning the manner of the performance of such work, including the cleaning out of the wells, the plugging of the same with cement, the places at which pipe might be cut and other similar provisions, as well as specific reference to the requirements of the Division of Oil and Gas of the State of California; all of which provisions are uniformly inserted in any agreement we make for the pulling of casing or the aban-

donment of wells. Had the agreement contemplated the abandonment of the wells on the Casmalia property the procedure for abandonment would have been worked out with particular care inasmuch as such land has not been depleted of oil but contains a large reserve of heavy oil valued roughly at approximately \$3,000,000, which reserve would be endangered by any inadequate abandonment program.

At no time during the negotiations for this agreement did you ever indicate to us, or to any of our field representatives, that you desired to attempt to remove the casing from the wells; nor can we conceive on what basis you could have estimated that there was any casing to be recovered from such wells. At the time your representative went over the property to ascertain how much in the way of salvagable tanks and other equipment were in existence the various wells on the property had been capped and the derricks had been removed. From an inspection of the premises it would have appeared that the wells had already been abandoned, in which case there would, of course, have been no casing to salvage from them.

Your letter of June 13th states "the wells have not been used by you for a long period of time and would not appear to have any value to you whatsoever". This is entirely incorrect. As stated above, there is a valuable reserve of oil under the property. While it is true that such wells have been idle for some time it has not been our intention to abandon the same and no casing could be removed from such wells without a full abandonment operation. Shortly before the time you executed your con-

tract with us another contractor had completed the work of pulling the tubing from the various wells on the property. At that time the wells were carefully capped and care was taken that no casing be removed from such wells in order that such wells could be operated at some time in the future. As a matter of fact, some weeks ago certain of the executive officials of the Company made a trip to Casmalia for the purpose of considering the feasibility of placing all of such wells upon production in the near future.

Accordingly we must advise you that you have no right to pull any of the casing from such wells and direct you to take no steps in connection with the same.

Yours very truly,

RICHFIELD OIL CORPORATION

By H. H. KELLY

Director of Purchases

cc: Messrs. Carl B. Sturzenacker  
and Philip Krasne,  
505 Taft Building,  
Hollywood, California.

[Verified.]

Received copy of the within Answer this 12th day of Jan., 1942. Philip N. Krasne, Attorney for Plaintiff.

[Endorsed]: Filed Jan. 12, 1942.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY JUDGMENT, OR IF DENIED, FOR BILL OF PARTICULARS.

To the defendant and to Robert E. Paradise, Esq., and William J. deMartini, Esq., Attorneys for Defendant, Please Take Notice that the motion of plaintiff Aaron Ferer and Sons for a Summary Judgment herein, or for a Bill of Particulars, should said motion for Summary Judgment be denied, will be brought on for hearing before the District Court of the United States for the Southern District of California, Central Division, on the 9th day of February, 1942, at the opening of court on that day or as soon thereafter as counsel can be heard. Said motion will be made upon affidavit attached hereto and upon all the records and files in the above entitled case.

Dated this 30th day of January, 1942.

PHILIP N. KRASNE,  
CARL B. STURZENAKER,

By Philip N. Krasne  
Attorneys for plaintiff  
Aaron Ferer & Sons.

[Endorsed]: Filed Jan. 30, 1942.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT OR IF  
DENIED, FOR BILL OF PARTICULARS.

To the Honorable United States District Court above  
named:

Plaintiff Aaron Ferer & Sons moves the Court as follows:

I.

For a Summary Judgment in favor of plaintiff and against defendant as to all matters contained in plaintiff's complaint and defendant's counter-claim or cross-complaint, except the amount of damages to which plaintiff is entitled, for the following reasons:

The court has heretofore concluded:

(1) That under the terms of the written contract between the parties hereto, defendant sold and conveyed to plaintiff the casing in the oil wells on defendant's land described in said contract, and

(2) That upon the face of the pleadings it appears that defendant has wrongfully breached said contract. (This conclusion, however, being reached without prejudice to the right of defendant to answer the amended complaint and establish such defense as it may have thereto).

The defendant has no defense to its said breach and that the allegations contained in defendant's answer on file herein to the effect that plaintiff is in default under said written contract, are without merit and are in fact frivolous.

The allegations contained in defendant's counter-claim or cross-complaint purporting to establish a cause of action for reformation of said written contract are not founded upon truth or fact and cannot be supported by evidence.

Prior to the filing of a counter-claim or cross-complaint alleging that a mistake had inadvertently been made in the preparation of said written contract, and that plaintiff and defendant had entered into an oral agreement with respect to the subject matter of the sale of equipment by defendant to plaintiff, differing from the subject matter described in said written contract, defendant has admitted by its pleadings on file herein that said written contract expressed the actual agreement of the parties.

## II.

In the event plaintiff's motion for Summary Judgment be denied, for a more definite statement or for a Bill of Particulars in connection with defendant's counter-claim or cross-complaint, for the following reasons, and setting forth details hereinbelow referred to:

Defendant alleged in its counter-claim or cross-complaint that on or about January 17th, 1941, plaintiff and defendant orally agreed to the sale by defendant to plaintiff of certain producing and refinery facilities and equipment, and "that the parties to said agreement did not intend that the subject matter of said agreement of sale should include any casing or pipe installed in any of of the wells." Defendant further alleges in substance and effect that the parties to said oral agreement intended to limit the subject matter of the sale to producing and refinery facilities and equipment which were located upon the surface of the premises owned by the defendant.

Such allegations are not averred with sufficient definiteness or particularity to enable plaintiff to prepare an answer thereto or to prepare for trial with respect thereto and are in fact alleged in the form of and as defendant's conclusions. Defendant's Bill of Particulars should allege in detail:

1. The names of the persons who entered into the alleged oral agreement.

2. What was said by said parties, if anything, concerning whether or not the casing in the wells was to be included in the subject matter of the sale.

3. What was said by the parties to the alleged oral agreement with respect to limiting the subject matter of the sale to equipment and facilities located upon the surface of defendant's premises.

4. What was said and done by defendant to show that defendant intended to exclude the casing from the subject matter of the sale or to show defendant's intention to limit the subject matter of the sale to equipment and facilities on the surface of defendant's premises.

5. What was said or done by plaintiff to show that plaintiff knew of, or suspicioned any such intentions on the part of defendant or that plaintiff intended that the subject matter of the sale was to be so limited.

Dated this 30th day of January, 1942.

PHILIP N. KRASNE,  
CARL B. STURZENACKER,  
By Philip N. Krasne

*Attorney for Plaintiff Aaron Ferer & Sons.*



[Title of District Court and Cause.]

AFFIDAVIT OF MORRIS FERER.

State of California,

County of Los Angeles,—ss.

Morris Ferer, being first duly sworn, upon oath, deposes and says:

1. That he is one of the partners of Aaron Ferer and Sons, plaintiff herein; that the remaining partners are Peggy Ferer, affiant's wife, and Robert Irving Ferer, affiant's son, and that affiant is in complete charge of the co-partnership business; that affiant carried on all of the negotiations between plaintiff and defendant pertaining to the sale by defendant to plaintiff of the equipment which is the subject matter of this litigation.

2. That the written contract executed by the parties hereto and which is the subject matter of this litigation, was drawn and prepared solely by defendant's attorney; that affiant was not represented by counsel in connection with the said written contract; that there was no mistake, mutual or otherwise, or inadvertance in the preparation of said written contract; that there was no oral contract between the parties relating to the sale by defendant to plaintiff of the producing and refining facilities and equipment covered by said written contract; that there were brief preliminary discussions leading to the execution of said written contract, but that said written contract as executed is in strict compliance with said preliminary discussions.

3. That shortly before the execution of said written contract, affiant met with one Harold Davis, an employee of defendant, and Robert E. Paradise, the defendant's

resident attorney, at defendant's premises, and that at said meeting, said Harold Davis and affiant informed said Robert E. Paradise of the desire of defendant to sell and plaintiff to purchase all of the producing and refining equipment and facilities at defendant's Casmelia property, except for certain specific items, which were then and there enumerated; that said Harold Davis requested said Robert E. Paradise to prepare a written contract covering said sale; that none of the parties at said meeting or at any other time prior to the execution of the written contract made any mention whatsoever of the casing in the oil wells at said premises or to any other specific pipe that was to be conveyed to plaintiff; that the only items of producing or refinery equipment or facilities which were specifically discussed or mentioned were the items that were to be excluded from the conveyance to plaintiff and that all of the items so specifically mentioned were excluded from the conveyance to plaintiff in the written contract as executed; that none of the parties at said meeting or at any other time prior to the execution of said written contract said anything whatsoever with respect to limiting the subject matter of the sale to equipment or facilities on the surface of the land at defendant's premises. That the words "on the surface" or any such or similar words were never even mentioned at said meeting or at any time prior to the execution of said written contract.

4. That after the meeting between said Harold Davis, Robert E. Paradise and affiant, said Robert E. Paradise

prepared and submitted to affiant a draft of a written contract, purporting to set forth the transaction as it had been outlined at said meeting and there was contained in said draft the following provision:

“Said equipment and facilities so to be sold include all pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors and tanks now located on said land, all subject to the exceptions hereafter provided.”

That affiant advised said Harold Davis and said Robert E. Paradise that in his opinion said clause might be construed as a limitation upon the understanding of the parties that the subject matter of the sale was to include ALL of the producing and refinery equipment and facilities except for the items specifically reserved, and affiant suggested that in order to obviate any such construction, the said clause be re-written as follows:

“Said equipment and facilities so to be sold include all pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors, tanks, METAL AND LUMBER now located on said land, all subject to the exceptions hereinafter provided.”

That affiant's suggestion was accepted by said Harold Davis and said Robert E. Paradise without demurrer or equivocation, and the words “metal and lumber” were added to the clause as aforesaid and are contained in the written contract as executed.

5. That affiant never intended that the subject matter of the sale should be limited to production and refinery

equipment and facilities ON THE SURFACE of the premises, or that the subject matter of the sale should not include the casing or pipe in the oil wells on said premises; that neither the defendant nor any of its employees, nor its attorney at any time prior to the execution of said written contract or for a long time thereafter, ever said or did anything whatsoever to indicate to affiant that the defendant intended the subject matter of the sale to be limited to production and refinery equipment and facilities ON THE SURFACE of the premises or that the subject matter of the sale should not include the casing or pipe in the oil wells on said premises; that if defendant intended that the subject matter of the sale was to be so limited or was not to include said casing or pipe, affiant had no knowledge of such intention or any suspicion thereof whatsoever.

That notwithstanding defendant's present contention that the casing or pipe in the oil wells was not to be included in the subject matter of the sale because it was not ON THE SURFACE of the premises, defendant has never questioned plaintiff's right under the written contract to remove a substantial quantity of pipe line which was underground and not ON THE SURFACE of the premises; that in truth and in fact, plaintiff was required to and did, dig trenches throughout the premises to remove such underground pipe.

6. That defendant at no time after the execution of

the written contract ever stated to affiant or even intimated that a mistake, mutual or otherwise had been made in the preparation of said written contract by inadvertence or otherwise, until defendant included allegations to that effect in its answer to the amended complaint on file herein; that in all of the discussions between affiant and defendant concerning the controversy which is the subject matter of this litigation, defendant simply contended that the written contract AS EXECUTED did not include the casing or pipe in the subject matter of the sale.

7. That affiant has never met and does not know Frank A. Morgan, one of the vice-presidents of defendant who verified the counter-claim or cross-complaint of defendant filed herein; that said counter-claim or cross-complaint in setting forth an alleged cause of action for reformation of the contract purports to show a definite oral agreement between plaintiff and defendant excluding the casing from the subject matter of the sale; said Frank A. Morgan by his verification, swore under oath that such an oral agreement was entered into with HIS OWN KNOWLEDGE; affiant is informed and believes and upon such information and belief deposes and says that the said counter-claim and cross-complaint was not verified by any of the employees of defendant who participated in the discussion of the transaction involved in this litigation for the reason that no such person could possibly swear under oath that an oral agreement as set forth in defendant's counter-claim or cross-complaint ever took place.

4. That defendant's allegation that plaintiff is in default under the terms and provisions of the written contract in that plaintiff has failed:

- "1) To remove from said premises certain quantities of brick now located on said premises;
- 2) To remove from said premises certain tanks now located on said premises; and
- 3) To remove from said premises and to dispose of quantities of oil, water and other sediment existing in various tanks located on said premises;"

(Contained in Paragraph III of defendant's answer, Page 4, Lines 20 to 29) is untrue: that the written contract provides that if plaintiff does not remove the *equipment* which is the subject matter of the sale within six months from the date of the execution of the said written contract, plaintiff shall be required to pay the defendant rental for the premises until the work has been completed, at the rate of \$50.00 a month; that defendant orally agreed to waive said rental when, for certain reasons beyond the control of plaintiff it became apparent that plaintiff would require more than six months time in which to perform said work; that the period for which the said rental was to be so waived by defendant was not definitely fixed by the oral agreement aforesaid, but plaintiff and defendant entered into a written agreement on or about the 6th day of January, 1942, wherein it was agreed that plaintiff would have until the 7th day of March, 1942, in which to complete said work, and if not completed, plaintiff would thereafter be required to pay defendant rental at the rate of \$50.00 a month until the work was completed: a copy of said written agreement is hereto at-

tached, marked Exhibit "A" and made a part of this affidavit by reference.

Morris Ferer.

Subscribed and sworn to before me this 29 day of January, 1942.

[Seal]

Carl B. Sturzenacker,

Notary Public in and for said County and State.

EXHIBIT "A".

"January 6, 1942

Richfield Oil Corporation,  
555 South Flower Street,  
Los Angeles, California.

Attention: Mr. Robert Paradise

Gentlemen:

Certain tanks, oil and bricks covered by the contract between yourself and the undersigned dated January 17, 1941, have not as yet been removed from your Casmelia property.

Under said contract, we were entitled to a period of six months from and after January 17, 1941, within which to remove all of the property purchased by us, and to do the cleaning up provided for. Under paragraph 14 of said contract, we were required to pay you rental at the rate of \$50.00 per month for all of the time we were on the property in excess of said six months' period.

You have heretofore verbally agreed to waive said rental payment, but the length of time for which said waiver would be effective has not been definitely fixed.

It is now understood and agreed by and between us that if we have not completed all the work to be done by us under said contract on or before March 7, 1942, we

shall pay you rental at the rate of \$50.00 per month from that date on for as long a period as is required to do all the work above referred to.

The chief reason for the delay which we have suffered is that it is necessary for us to burn several thousand barrels of oil now on the premises, and there has been some difficulty about obtaining permission to do so from the fire authorities.

We agree to use our best efforts to be off the property and have all the work we are to do completed before March 7, 1942.

It is understood and agreed that any cause of action which you have, or may feel that you have, against us by reason of any alleged failure on our part to remove the equipment and do the work required of us to be done under said contract, need not be set up by you as a cross complaint or counter claim in the action now pending in the District Court of the United States between ourselves as plaintiff and yourself as defendant (No. 1718-H), and that your failure to file a cross complaint or counter claim with respect to the subject matter referred to shall not constitute a waiver of any cause of action which you have or may claim to have with respect thereto.

Very truly yours,

AARON FERER AND SONS

By Morris Ferer

Contents Noted and Approved:

RICHFIELD OIL CORPORATION

By H. H. Kelly"



[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR FOR BILL OF PARTICULARS.

To the Honorable United States Court above named:

**I.**

Either party to an action may move for a Summary Judgment in his favor upon all or any part of a claim, counter-claim or cross-claim. Rule 56, Rules of Civil Procedure for the District Courts of the United States.

**II.**

This court in a written memorandum of conclusions dated December 29th, 1941, has heretofore concluded:

1. That under the terms of the written contract between the parties hereto defendant sold and conveyed to plaintiff the casing in the oil wells on defendant's land described in said contract, and

2. That upon the face of the pleadings it appears that defendant has wrongfully breached said contract, this conclusion however, being reached without prejudice to the right of defendant to answer the amended complaint and establish such defense as it may have thereto.

Leaving aside for a moment the question of defendant's theory for reformation of the written contract alleged in the defendant's counter-claim or cross-complaint, the only possible defense to defendant's breach of the

contract is the allegation contained in Paragraph III of defendant's answer, to the effect that plaintiff is in default under the terms and provisions of the written contract for failure to remove certain brick, tanks, oil, water and other sediment from the premises. We submit that the letter agreement dated January 6, 1942, marked Exhibit A and attached to the affidavit of Morris Ferer in support of this motion, establishes conclusively that plaintiff is not in default for the failure to remove the items referred to.

Accordingly, unless the court sees merit in defendant's counter-claim or cross-complaint, it is quite obvious that defendant has no defense whatsoever to its breach of the written contract and the conclusions of this court with respect thereto should be final.

### III.

The defendant, by the pleadings on file herein and by statements of counsel in open court prior to the filing of the counter-claim or cross-complaint has admitted that the written contract expresses the actual agreement of the parties. It was the defendant's position at all times prior to the filing of the counter-claim and cross-complaint that the written contract relates only to equipment ON THE SURFACE of the premises and does not convey to plaintiff the casing in the wells. It was never the position of defendant that the contract did not correctly set forth the agreement of the parties. In this connection we call the court's attention to a significant sentence in the Memorandum of Points and Authorities which defendant filed

in support of its motion to dismiss plaintiff's amended complaint:

"The intention of the parties, as disclosed by the language of the contract, was to sell the equipment located on the surface of the land, excepting certain stated items of such surface equipment." (Underlining ours.)

This sentence appears on Page 2, Lines 11 to 14 of said Memorandum of Points and Authorities.

It is apparent to us that defendant's theory of reformation, suggested for the first time in defendant's counterclaim or cross-complaint and in view of the position taken by defendant in this action prior thereto, is designed by defendant for the sole purpose of circumventing this court's previous conclusions, and that plaintiff is entitled to a Summary Judgment on all phases of this action, except as to the amount of damages that plaintiff can establish.

#### IV.

Either party may move for a more definite statement or for a Bill of Particulars of any matter which is not averred with sufficient definiteness or particularity. (Subd. e) Rule 12 of Rules of Civil Procedure before the District Courts of the United States.

The allegations of defendant contained in the counterclaim or cross-complaint with respect to the alleged oral

agreement and with respect to the intentions of the parties are almost entirely in the form of legal conclusions.

In the event that plaintiff's motion for Summary Judgment be denied and the question of reformation of the contract is to go to trial, plaintiff is entitled to know considerably more about the alleged oral agreement and the alleged intentions of the parties than has been alleged in the form of defendant's conclusions and defendant should be ordered to set forth in detail what was said and by whom to show that the casing in the wells was not to be included in the subject matter of the sale and to show that the parties intended to limit the subject matter of the sale to equipment and facilities located upon the surface of defendant's premises and to show that if defendant had any such intentions, plaintiff knew thereof or had reason to suspect same.

Respectfully submitted,

PHILIP N. KRASNE,

CARL B. STURZENACKER,

By Philip N. Krasne,

Attorneys for Plaintiff Aaron Ferer & Sons.

Received copy of the within Notice of Motion this 30th day of Jan. 1942. R. E. Paradise, W. J. De Martini, Attorneys for Defendant.

[Endorsed]: Filed Jan. 30, 1942.]

[Title of District Court and Cause.]

## PETITION

Defendant, Richfield Oil Corporation, respectfully petitions the above entitled Court as follows:

### I.

That defendant has heretofore filed an answer in the above entitled case, which answer contains two causes of action of counterclaim or cross-complaint for the reformation of the written contract described in the complaint. That there is now pending in this case a motion of the plaintiff for summary judgment or for bill of particulars, which motion is based upon the ground that "the allegations contained in defendant's counterclaim or cross-complaint purporting to establish a cause of action for reformation of said written contract are not founded upon truth or fact and cannot be supported by evidence". That plaintiff's motion for summary judgment is based upon the affidavit of Morris Ferer in which affidavit the said Morris Ferer stated that he never intended "that the subject matter of the sale should not include the casing or pipe in the oil wells on said premises" and "that if defendant intended that the subject matter of the sale was to be so limited or was not to include said casing or pipe, affiant had no knowledge of such intention or any suspicion thereof whatsoever".

## II.

That certain facts necessary to controvert such statements in the affidavit of Morris Ferer are peculiarly within the knowledge of said Morris Ferer and of his business associate, T. H. Clements, who participated in the negotiations for the contract described in the amended complaint herein and that it is necessary that the depositions of Morris Ferer and T. H. Clements be taken upon oral examination for the purpose of opposing plaintiff's motion for summary judgment and for discovery and for evidence at the trial of the above entitled case.

## III.

That on February 3, 1942, your petitioner gave to the plaintiff notice of the taking of depositions of Morris Ferer and T. H. Clements in the above entitled cause, which said notice, together with prooof of service thereof, is now on file with the Clerk of the above entitled Court.

## IV.

That at the taking of said depositions of Morris Ferer and T. H. Clements your petitioner seeks to have the following documents produced by said witnesses:

(a) All written memoranda, records, tabulations, estimates and correspondence prepared during the years 1940 and 1941 by Morris Ferer, T. H. Clements and Aaron Ferer & Sons, or by any of their employees or agents, pertaining to the purchase by Aaron Ferer & Sons of facilities and equipment from Richfield Oil Corporation, or pertaining to the facilities and equipment to be purchased by Aaron Ferer & Sons from Richfield Oil Corporation.

(b) All written memoranda, records, tabulations, estimates and correspondence prepared during the

years 1940 and 1941 by Morris Ferer, T. H. Clements and Aaron Ferer & Sons, or by any of their employees or agents, and used by any of them in estimating the price of Twenty-two Thousand Dollars (\$22,000.00) offered to Richfield Oil Corporation by Aaron Ferer & Sons as the purchase price for such facilities and equipment.

(c) Copies of all logs and histories and drillers' reports or records of or pertaining to any of the wells located upon the land of Richfield Oil Corporation described in the contract dated January 17, 1941, attached to the amended complaint herein.

Wherefore, defendant respectfully prays that the Court make and enter its order herein granting leave for the taking of said depositions of Morris Ferer and T. H. Clements at the time and place specified in the notice referred to hereinabove, and that subpoenas commanding the production by the said Morris Ferer and T. H. Clements of the documentary evidence described hereinabove be issued and used at the taking of said depositions and for such further relief as will be just and proper.

Dated: February 4th, 1942.

ROBERT E. PARADISE and

WILLIAM J. DeMARTINI

By Robert E. Paradise

Attorneys for Defendant,

RICHFIELD OIL CORPORATION

[Endorsed]: Filed Feb. 4, 1942.

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT E. PARADISE IN  
SUPPORT OF PETITION

State of California,  
County of Los Angeles—ss.

Robert E. Paradise, being first duly sworn, deposes and says:

1. That he is one of the attorneys of record for Richfield Oil Corporation, defendant in the above entitled case, and is familiar with the matters therein involved.

2. That the plaintiff has filed in the above entitled action its Motion for Summary Judgment, which Motion is set for hearing before the above entitled Court on February 9, 1942. That said Motion is directed to the two causes of action of counterclaim or cross-complaint set forth in defendant's Answer on file herein. That said Motion is based upon the affidavit of Morris Ferer, in which affidavit the said Morris Ferer stated that he never intended "that the subject matter of the sale should not include the casing or pipe in the oil wells on said premises" and "that if defendant intended that the subject matter of the sale was to be so limited or was not to include said casing or pipe, affiant had no knowledge of such intention or any suspicion thereof whatsoever".

3. That the attached petition of defendant, Richfield Oil Corporation, requests the production by Morris Ferer and T. H. Clements of the following documents at the taking of their depositions:

(a) All written memoranda, records, tabulations, estimates and correspondence prepared during the years 1940 and 1941 by Morris Ferer, T. H. Clem-



ents and Aaron Ferer & Sons, or by any of their employees or agents, pertaining to the purchase by Aaron Ferer & Sons of facilities and equipment from Richfield Oil Corporation, or pertaining to the facilities and equipment to be purchased by Aaron Ferer & Sons from Richfield Oil Corporation.

(b) All written memoranda, records, tabulations, estimates and correspondence prepared during the years 1940 and 1941 by Morris Ferer, T. H. Clements and Aaron Ferer & Sons, or by any of their employees or agents, and used by any of them in estimating the price of Twenty-two Thousand Dollars (\$22,000.00) offered to Richfield Oil Corporation by Aaron Ferer & Sons as the purchase price for such facilities and equipment.

(c) Copies of all logs and histories and drillers' reports or records of or pertaining to any of the wells located upon the land of Richfield Oil Corporation described in the contract dated January 17, 1941, attached to the amended complaint herein.

4. That affiant believes that said documents, and each of them, are material to the issues raised by defendant's Answer and Counterclaim and by Motion for Summary Judgment.

Robert E. Paradise

Subscribed and sworn to before me this 4 day of February, 1942.

[Seal]

R. A. Harbaugh,

Notary Public in and for said County and State.

My Commission expires Mar. 8, 1943.

[Endorsed]: Filed Feb. 4, 1942.

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT E. PARADISE.

State of California,

County of Los Angeles—ss.

Robert E. Paradise, being first duly sworn, deposes and says:

1. That he is one of the attorneys of record for Richfield Oil Corporation, defendant in the above entitled case, and is familiar with the matters therein involved.

2. That the plaintiff has filed in the above entitled action its Motion for Summary Judgment, which Motion is set for hearing before the above entitled Court on February 9, 1942. That said Motion is directed to the two causes of action of counterclaim or cross-complaint set forth in defendant's Answer on file herein. That said Motion is based upon the affidavit of Morris Ferer, in which affidavit the said Morris Ferer stated that he never intended "that the subject matter of the sale should not include the casing or pipe in the oil wells on said premises" and "that if defendant intended that the subject matter of the sale was to be so limited or was not to include said casing or pipe, affiant had no knowledge of such intention or any suspicion thereof whatsoever."

3. That certain facts necessary to controvert such statements in the affidavit of Morris Ferer are peculiarly within the knowledge of the said Morris Ferer and his business associate, T. H. Clements, and that for such reason the defendant cannot present by affidavit certain facts essential to justify defendant's opposition to plaintiff's Motion for a Summary Judgment.

4. That affiant deems it necessary and advisable that the depositions of Morris Ferer and T. H. Clements be taken and that such depositions be verified and filed in this action in order that the Court, in ruling upon plaintiff's Motion for Summary Judgment, may consider such depositions and have before it facts relevant and material to the issues between plaintiff and defendant.

Robert E. Paradise

Subscribed and sworn to before me this 3 day of February, 1942.

[Seal]

R. A. Harbaugh,

Notary Public in and for said County and State.

My Commission expires Mar. 8, 1943.

Received copy of the within this 3rd day of February, 1942. Sturzenaker & Krasne (R. P.)

[Endorsed]: Filed Feb. 4, 1942.

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[Title of District Court and Cause.]

### ORDER

Upon reading and filing the petition of Richfield Oil Corporation and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed that Defendant is hereby granted leave to take the depositions of Morris Ferer and T. H. Clements and that subpoenas commanding the production by the said Morris Ferer and

T. H. Clements of the following described documentary evidence be used at the taking of said depositions:

(a) All written memoranda, records, tabulations, estimates and correspondence prepared during the years 1940 and 1941 by Morris Ferer, T. H. Clements and Aaron Ferer & Sons, or by any of their employees or agents, pertaining to the purchase by Aaron Ferer & Sons of facilities and equipment from Richfield Oil Corporation, or pertaining to the facilities and equipment to be purchased by Aaron Ferer & Sons from Richfield Oil Corporation.

(b) All written memoranda, records, tabulations, estimates and correspondence prepared during the years 1940 and 1941 by Morris Ferer, T. H. Clements and Aaron Ferer & Sons, or by any of their employees or agents, and used by any of them in estimating the price of Twenty-two Thousand Dollars (\$22,000.00) offered to Richfield Oil Corporation by Aaron Ferer & Sons as the purchase price for such facilities and equipment.

(c) Copies of all logs and histories and drillers' reports or records of or pertaining to any of the wells located upon the land of Richfield Oil Corporation described in the contract dated January 17, 1941, attached to the amended complaint herein.

Dated this 4th day of February, 1942.

H. A. Hollzer

United States District Judge.

[Endorsed]: Filed Feb. 4, 1942.

[Title of District Court and Cause.]

NOTICE OF TAKING DEPOSITION.

To the Plaintiff, Aaron Ferer & Sons, and to Philip N. Krasne, Esq. and Carl B. Sturzenacker, Esq., Attorneys for the Plaintiff:

You, and each of you, are hereby notified that the deposition of David Zeidenfeld will be taken upon oral examination before Ross Reynolds, a Notary Public in and for the State of California, or before any other Notary Public in and for the State of California, on the 13th day of February, 1942, at 10:00 A. M. at Room 1221 Richfield Building in Los Angeles, California; that the address of said person is as follows:

David Zeidenfeld

1027 South Crescent Heights Blvd.

Los Angeles, California

that said deposition will be taken for the purpose of discovery and for use in evidence at the hearing on plaintiff's motion for summary judgment and in the trial of the above named action.

Dated this 12 day of February, 1942.

ROBERT E. PARADISE and

WILLIAM J. DeMARTINI

By Robert E. Paradise

ROBERT E. PARADISE

Attorneys for Defendant, Richfield Oil Corporation

Received copy of the within this 12th day of Feb., 1942.  
Philip N. Krasne, Attorney for Pltff.

[Endorsed]: Filed Feb. 12, 1942.

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT E. PARADISE.

State of California,

County of Los Angeles—ss.

Robert E. Paradise, being first duly sworn, deposes and says:

That he is one of the attorneys of record for Richfield Oil Corporation, defendant in the above entitled case, and is familiar with the matters therein involved.

That the plaintiff has filed in the above entitled action its Motion for Summary Judgment, which Motion is set for hearing before the above entitled Court on February 16, 1942. That said Motion is directed to the two causes of action of counterclaim or cross-complaint set forth in defendant's Answer on file herein. That said Motion is based upon the affidavit of Morris Ferer, in which affidavit the said Morris Ferer stated that he never intended "that the subject matter of the sale should not include the casing or pipe in the oil wells on said premises" and "that if defendant intended that the subject matter of the sale was to be so limited or was not to include said casing or pipe, affiant had no knowledge of such intention or any suspicion thereof whatsoever."

That certain facts necessary to controvert such statements in the affidavit of Morris Ferer are within the knowledge of David Zeidenfeld, a former employee of the plaintiff herein. That affiant is informed and believes and

therefore states that the said David Zeidenfeld participated in the transaction between plaintiff and defendant referred to in this cause. That affiant was informed on February 11, 1941 of the extent of the said David Zeidenfeld's participation in such transaction. That for such reason the defendant cannot present by affidavit certain facts essential to justify defendant's opposition to plaintiff's Motion for Summary Judgment.

That affiant deems it necessary and advisable that the deposition of David Zeidenfeld be taken and that such deposition be verified and filed in this action in order that the Court, in ruling upon plaintiff's Motion for Summary Judgment, may consider such deposition and have before it facts relevant and material to the issues between plaintiff and defendant.

Robert E. Paradise

Subscribed and sworn to before me this 12th day of February, 1942.

[Seal]

Chas. A. Root,

Notary Public in and for said County and State.

Received copy of the within this 12 day of Feb., 1942.  
Philip N. Krasne, Attorney for Pltf.

[Endorsed]: Filed Feb. 12, 1942.

At a stated term, to-wit: The February Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 12th day of February in the year of our Lord one thousand nine hundred and forty-two.

Present:

The Honorable Harry A. Hollzer, District Judge.

No. 1718-H Civil

Aaron Ferer & Sons,

Plaintiff,

vs.

Richfield Oil Corporation, a corporation,

Defendant.

This cause now coming before the Court *ex parte*; Robert E. Paradise, Esq., appearing as counsel for the defendant, and Philip Krasne, Esq., appearing as counsel for the plaintiff;

Attorney Paradise asks for a continuance of hearing on plaintiff's motion for Summary Judgment, now set for hearing on February 16, 1942, or that an Order be made shortening time for taking and filing of deposition of one David Zeidenfeld, and Attorney Krasne states that the plaintiff objects to a continuance of hearing on motion for Summary Judgment but does not oppose an Order shortening time to take deposition, and it is ordered that said deposition be taken on February 13, 1942, at 10 A. M. at the office of Attorney Paradise and be filed by February 16, 1942.



[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT, OR  
FOR BILL OF PARTICULARS.

State of California,

County of Los Angeles—ss.

F. L. McGahan, being first duly sworn, deposes and says:

That he is now and at all times mentioned herein was employed by Richfield Oil Corporation as Supervisor of Storehouses. That at the times hereinafter mentioned his office was located at Richfield Oil Corporation's Richville Camp near Long Beach, California. That his duties include the notifying of prospective bidders when the Management of Richfield Oil Corporation has determined that any of Richfield's old or salvage equipment is to be sold.

That Affiant was acquainted with David Zeidenfeld, who was employed by Aaron Ferer & Sons, during the year of 1940. That the said David Zeidenfeld had, on various occasions, visited Affiant in Affiant's office and discussed the purchase by Aaron Ferer & Sons of salvage equipment belonging to Richfield Oil Corporation at various locations. That during August or September of 1940 Affiant told David Zeidenfeld that Richfield Oil Corporation was planning on taking bids for and selling certain "surface equipment" located at Richfield's Casmalia property, and told David Zeidenfeld further that Affiant did not have specific information at that time as to what items of surface equipment were located on the property. Affiant inquired of David Zeidenfeld whether Aaron Ferer &

Sons would be interested in submitting a bid for such equipment.

That subsequent to the last mentioned conversation with David Zeidenfeld, Affiant had a conversation with Morris Ferer. That the said Morris Ferer asked Affiant what equipment Richfield had at Casmalia and what equipment Richfield desired to sell. That Affiant told the said Morris Ferer that the equipment to be sold was "surface equipment" which generally included tanks, boilers, pipe lines, valves and fittings, and that Affiant had no specific inventory of such equipment at that time but that Affiant would have a better idea of the specific items and quantities after Affiant had made a further investigation of the property. Affiant told Morris Ferer that Affiant intended to visit the Casmalia property in the near future for the purpose of finding out more specifically what was located there. Affiant told Morris Ferer that when Affiant had obtained such specific information, it would be available to Morris Ferer. That Affiant told Morris Ferer that he would be glad to meet Morris Ferer at the Casmalia property at any time and take him around such property and show him what equipment was available for sale. That Affiant told Morris Ferer that it would be satisfactory for Morris Ferer to examine the property. That Affiant did not tell Morris Ferer that Mr. Ferer would have to make his own investigation of the property, or that Mr. Ferer would have to find out for himself what was available for sale. That Affiant did not tell the said Morris Ferer on that occasion, or at any other occasion, that everything which Richfield had on the property would be sold.

That subsequently and some time during the last week of November or the first week of December of 1940 the said David Zeidenfeld again visited Affiant at Affiant's Richville office. That subsequent to Affiant's conversation with Morris Ferer and prior to such second visit by David Zeidenfeld at the Richville office, Affiant had made a further inspection of the Casmalia property and had made written memoranda and estimates of the equipment which was available for sale and of the approximate tonnage of such equipment. That at such second visit of David Zeidenfeld, Affiant told him that he had more information as to the equipment which Richfield Oil Corporation had available and was willing to sell and Affiant showed David Zeidenfeld Affiant's penciled memoranda and estimates. That attached hereto and marked Exhibit "A" are photostatic copies of the penciled memoranda and estimates which Affiant showed to David Zeidenfeld. That Affiant and David Zeidenfeld discussed the items shown on the memoranda and estimates and, in answer to David Zeidenfeld's inquiry, Affiant told him that Affiant's estimate of the over-all tonnage of the equipment to be sold was approximately fifteen hundred (1500) tons, of which quantity approximately nine hundred and twenty (920) tons represented the pipe lines, and that the remaining five hundred and eighty (580) tons represented the other surface equipment including boilers, pumps, valves and fittings and refinery equipment. That in said conversations between Affiant and David Zeidenfeld the terms "pipe lines" and "pipe" were used interchangeably by both Affiant and David Zeidenfeld as referring to the same thing. That Affiant also told David Zeidenfeld that

his estimate of the tonnage of the pipe lines might not be exact since Richfield had only old records, including a map, of what pipe lines were originally installed on the property and that he did not know whether some of the pipe lines shown on such records or on the map had since been removed or whether any additional pipe lines had been placed on the land which did not appear on such records or such map. That the map which Affiant referred to in said conversation is the same map, a copy of which is attached to the contract between Aaron Ferer & Sons and Richfield dated January 17, 1941. That Affiant did not state at the conversation, nor did he tell David Zeidenfeld or Morris Ferer at any other conversation, that Richfield was willing to sell "everything" or "all equipment on the property" with the exception of certain items. That Affiant did tell David Zeidenfeld at such conversation that Richfield was willing to sell all "surface equipment" with the exception of certain tanks, shell stills, dehydrators, pipe lines and other equipment. That casing installed in oil wells is not "surface equipment" and is never referred to as "surface equipment." That the casing installed in oil wells is not a "pipe line" and is never referred to as a "pipe line." That there was no mention in said conversation with David Zeidenfeld, or in any other conversation with David Zeidenfeld or Morris Ferer, of any wells upon the Casmalia property or of the casing in any wells upon such property.

That subsequently and during the second week of January, 1941, Affiant attended a meeting in the office of Mr. Paradise, one of the attorneys for Richfield Oil Corporation, at which meeting there were also present Messrs.

Morris Ferer, T. H. Clements, Harold David and Paradise. That at said meeting Mr. Morris Ferer stated that he would like to have the words "metal and lumber" added to the proposed contract. He was asked for the reason for his request. Mr. Ferer then read aloud the proposed list of the items which had been prepared, to wit, "pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors, and tanks" and Mr. Ferer stated that there was additional material which he understood was covered by the sale and which were not included in such list. Mr. Ferer then stated that such additional material was loose metal and lumber lying around the property, a large pile of wire line and cast iron and the metal supports for the various stills and the metal supports for overhead lines in the refinery. Mr. Ferer stated that none of these items were included in the list which he had read and that he thought such items would be included if the words "metal and lumber" were added. Mr. Davis then stated that it would be satisfactory to add the words "metal and lumber" since it was his understanding that Mr. Ferer was to purchase the items he had mentioned. There was no mention at that meeting, or at any other meeting, by anyone present of the casing in any of the oil wells on the property. That none of the casing can be removed from an oil well without abandonment of such well in accordance with the requirements of the Division of Oil and Gas of the State of California. That there was no mention at that meeting, or at any other meeting, by anyone present of the abandonment of any of the oil wells on the property.

That Affiant at all times intended that the equipment to be sold from the Casmalia property be limited to surface equipment. That Affiant never intended that the equipment to be sold from the Casmalia property include the casing in any of the oil wells on the property. That Affiant never intended that any of the oil wells upon the property be abandoned. That the only mention, at the meeting in Mr. Paradise's office referred to above, of any of the oil wells on the property was when Mr. Davis laid upon the desk a large map of the property and pointed out on the map the gas line running from the superintendent's house to one of the wells on the property, which Mr. Davis said should be excluded from the sale in order that the superintendent's house might be continued to be served with gas from such well. Mr. Davis also stated at said meeting that the contract should contain a provision excluding the gas line and perhaps some extensions of it to additional wells.

F. I. McGahan

Subscribed and sworn to before me this 17 day of February, 1942.

[Seal]

R. A. Harbaugh,

Notary Public in and for said County and State.  
My Commission Expires March 8, 1943.

Exhibit "A" Omitted—Same as Defendant's Exhibit "B" at Trial.

Received copy of the within this 17th day of Feb., 1942. Philip N. Krasne (R. P.).

[Endorsed]: Filed Feb. 17, 1942.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT, OR  
FOR BILL OF PARTICULARS.

State of California,  
County of Los Angeles—ss.

H. H. Kelly, being first duly sworn, deposes and says:

That he is now and at all times herein mentioned was employed by Richfield Oil Corporation as Director of Purchases. That his duties and authority include the making of sales and the execution of contracts for the sale of old and salvage equipment belonging to Richfield Oil Corporation. That Harold Davis is employed in the Purchasing Department of Richfield Oil Corporation but that Harold Davis has no authority to make sales of such nature or to execute contracts of sale of such nature.

That Affiant executed on behalf of Richfield Oil Corporation the written contract dated January 17, 1941 between Richfield Oil Corporation and Aaron Ferer & Sons. That several months prior to the execution of said written contract, Affiant notified Harold Davis that the Management had determined to sell certain equipment belonging to Richfield located on the Casmalia property and requested the said Harold Davis to arrange for getting bids for such sale from prospective purchasers. That at no time, either before or after the execution of said contract between Richfield and Aaron Ferer & Sons, did Affiant intend to sell to Aaron Ferer & Sons the casing in any of

the oil wells located upon the Casmalia property, nor did Affiant intend that any of the wells upon such property be abandoned. That said Casmalia property is owned in fee by Richfield Oil Corporation. That Affiant was and is informed that said wells were drilled by the predecessor in interest of Richfield Oil Corporation during the period from 1916 to 1925 to depths ranging from thirteen hundred fifty feet (1350') to forty-two hundred feet (4200') for the purpose of producing oil from a pool underlying said property. That Affiant was and is informed that the production of oil from said wells was discontinued on or about October of 1925 because of a decreased market value at such time for such oil. That Affiant was and is informed that at the time of the cessation of such production activity, the reservoir of oil underlying such property had not been exhausted and that at such time there remained and now remains a reservoir of oil underlying said property valued at approximately Three Million Dollars (\$3,000,000.00); which reservoir is owned by Richfield Oil Corporation. That said wells are not now abandoned and Affiant is informed by the Production Department of Richfield Oil Corporation that said wells may be operated for the production of oil therefrom. That during the year preceding the date of the execution of the contract dated January 17, 1941 between Richfield and Aaron Ferer & Sons, Richfield Oil Corporation removed from said wells the derricks and the tubing and rods installed therein, which removal was deemed advisable because of the worn condition thereof. That at



the time of the removal of such derricks, tubing and rods the wells were not abandoned and the casing was left in such wells and the wells were each capped at the surface thereof in order that such wells might in the future be opened and re-entered for the production of oil therefrom. That at all times, both before and after the execution of said contract on January 17, 1941, it was and now is the intention of Richfield Oil Corporation to produce oil from said wells at such time as the need and demand for oil of the quality contained in said reservoir shall make such production desirable. That Affiant was and is informed by the Production Department of Richfield Oil Corporation that no casing can be removed from any oil well in California without abandonment of such well (including the plugging of the same with cement) under the provisions of Section 3233 of the Public Resources Code of the State of California; that it is physically impossible to produce oil from any well which has been abandoned in accordance with such provisions of the California Public Resources Code; that if the thirty-two (32) wells on said Casmalia property were abandoned, it would be necessary for Richfield Oil Corporation to drill and install casing in thirty-two (32) additional wells; that the cost of drilling and installing casing in wells on said property to the same depths as the present thirty-two (32) wells thereon, would be an average sum of not less than Fifteen Thousand Dollars (\$15,000.00) per well, or an aggregate sum of not less than Four Hundred Eighty Thousand Dollars (\$480,000.00) for such thirty-two (32) wells.

That the six (6) large storage tanks now located upon the property are surface equipment which was excluded from the sale to Aaron Ferer & Sons for the reason that the Management of Richfield Oil Corporation at all times both prior to and subsequent to the execution of said contract with Aaron Ferer & Sons intended to use such tanks for the purpose of storing oil when the wells on such property should be restored to production.

That Affiant examined carefully the written contract dated January 17, 1941 before he executed the same on behalf of Richfield Oil Corporation. That at such time it was Affiant's understanding that the phrase "metal and lumber" appearing in said written contract referred only to loose scrap metal and loose lumber lying upon the surface of the Casmalia property and to the metal supports for certain of the refinery structures. That Affiant did not intend or understand that said phrase "metal and lumber" should include the casing in any of the oil wells on any of the property or that the subject matter of the sale include anything other than the surface equipment on the property.

H. H. Kelly

Subscribed and sworn to before me this 13th day of February, 1942.

[Seal]

Chas. A. Root,

Notary Public in and for said County and State.

Received copy of the within this 17 day of Feb., 1942.  
Philip N. Krasne (R. P.)

[Endorsed]: Filed Feb. 17, 1942.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT, OR  
FOR BILL OF PARTICULARS.

State of California,  
County of Los Angeles—ss.

Harold Davis, being first duly sworn, deposes and says:

That he is and at all times herein mentioned was employed in the Purchasing Department of Richfield Oil Corporation. That among his duties are arranging the preliminary negotiations for the sale by Richfield Oil Corporation of its salvage and worn-out equipment. That on or about the month of August, 1940, he notified Mr. McGahan, the Storehouse Supervisor of Richfield Oil Corporation, that the Management had decided to sell certain of the surface equipment at Casmalia and requested Mr. McGahan to notify prospective bidders that such surface equipment, with certain exceptions, would be made available for sale. That shortly thereafter Affiant asked Mr. R. D. Montgomery, head of the Exploitation Department of Richfield Oil Corporation, which, if any, of the surface equipment at Casmalia Mr. Montgomery desired to have left remain on the property. Mr. Montgomery informed Affiant that he wanted to have the large storage tanks remain on the property in case the Management should determine to open up for production any of the wells on the land.

That on or about January 8, 1941 a meeting was held in Affiant's office in the Richfield Building, at which were present Messrs. Morris Ferer and T. H. Clements. At that meeting Mr. Clements stated that he and Mr. Ferer wanted to purchase the six (6) large storage tanks as a part of the transaction and he asked Affiant why such tanks were excluded. Affiant stated that he had taken the matter up with the Management and that the Management desired to have the tanks excluded in order that they might be used for storage purposes if Richfield should decide to open up the field for production. That Affiant also stated that there was certain oil in one of the excluded tanks that was being stored by Richfield for the Casmite Company. That Affiant did not state to Mr. Clements or Mr. Ferer at that meeting, or at any other meeting, that the tanks were excluded in order that they might be moved to Maricopa for production purposes.

That Affiant was present at a meeting in the office of Mr. Paradise, one of the attorneys for Richfield Oil Corporation. That there were also present at that meeting Messrs. Morris Ferer, Clements, McGahan and Paradise. ~~That the meeting had been called for the purpose of discussing the terms of the proposed contract between Richfield and Aaron Ferer & Sons.~~ That during the meeting Mr. Ferer stated that he objected to the list of equipment which had been prepared. That Mr. Ferer read the list to those present as including "pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors and tanks" and stated that the list was not sufficiently inclusive because

there were other items which he expected to purchase which were not included in the list. That Affiant inquired what such other items were and Mr. Ferer stated that they were loose lumber and metal lying around the property at various locations, including a scrap pile of wire line and cast iron. That Mr. Ferer also mentioned the metal supports for the stills around the refinery and the metal supports for overhead lines at the refinery and stated that those items were not included in the list which he had read. That Mr. Ferer then inquired how much of the metal supports for the refinery shell stills would be left by the Casmite Company when it removed the shell stills from the property, which shell stills were excluded from the sale to Aaron Ferer & Sons. That Affiant telephoned the Casmite Company from Mr. Paradise's office and, at the conclusion of the telephone conversation, told Mr. Ferer and Mr. Clements the points at which the Casmite Company would cut the stills from the metal supports. That Mr. Ferer or Mr. Clements stated that they expected to get the remaining metal supports attached to such stills. That Affiant stated that it was his understanding that Mr. Ferer and Mr. Clements were to get such loose metal and the other items which Mr. Ferer had mentioned and that it was satisfactory to include the words "metal and lumber" in the contract. That neither Mr. Ferer nor Mr. Clements, nor any other person present at the meeting mentioned the casing in any of the wells on the property. That Mr. Ferer did not refer to the casing in any of the wells on the property when Affiant asked Mr. Ferer what items Mr. Ferer was referring to when he requested the inclusion of the phrase "metal and lumber." ~~That Affiant~~

did not intend that there be included in the sale, the casing in any of the wells on the property.

That at said meeting in the office of Mr. Paradise, Affiant pointed out to Mr. Ferer and Mr. Clements, on a large map of the property, the gas line from the superintendent's house to one of the wells on the property and stated that Richfield also desired to exclude such line from the sale in order that the superintendent's house could continue to receive gas from such well. Affiant also stated that if there was not gas in such well sufficient to serve the superintendent's house that it might be necessary also to exclude gas lines running to other wells on the property in order to insure a sufficient gas supply to the superintendent's house. That the map which Affiant brought to the meeting was a copy of the same map which is attached to the contract between Richfield and Aaron Ferer & Sons.

That at none of the meetings or conversations with either Mr. Ferer or Mr. Clements was there any mention whatsoever of the casing in any of the oil wells on the property or of the abandonment by Aaron Ferer & Sons of any of the oil wells on the property.

Harold Davis

Subscribed and sworn to before me this 13th day of February, 1942.

[Seal]

Chas. A. Root,

Notary Public in and for said County and State.

Received copy of the within this 17th day of Feb., 1942.  
Philip N. Krasne (R. P.).

[Endorsed]: Filed Feb. 17, 1942.

[Title of District Court and Cause.]

FURTHER AFFIDAVIT IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT, OR FOR BILL OF PARTICULARS.

State of California,  
County of Los Angeles—ss.

F. I. McGahan, being first duly sworn, deposes and says:

That prior to January 17, 1941, the date of the execution of the contract between Richfield and Aaron Ferer & Sons, Affiant had two or three conversations with T. H. Clements in Affiant's Richville office concerning Richfield's proposed sale of equipment from its Casmalia property. That Affiant did not state at any of such conversations with Mr. Clements that everything on the property would be sold with certain exceptions. That at the first or second conversation with the said T. H. Clements, Affiant stated to him that the "surface equipment" with certain exceptions would be sold. That Affiant did not state to Mr. Clements at any conversation with Mr. Clements that Richfield Oil Corporation or its Production Department was planning on taking any storage tanks from the Casmalia property and using them at Maricopa.

That the said T. H. Clements did not at any of Affiant's conversations with T. H. Clements ever ask Affiant for any inventory of the equipment and facilities at Casmalia

which were to be sold. That at Affiant's first conversation with Mr. Clements concerning the proposed sale, which conversation occurred about the first of November, 1940, Affiant told Mr. Clements that he had no inventory of the facilities or equipment at Casmalia but that Affiant planned on making an inspection of the Casmalia property and that Affiant would be able to furnish Mr. Clements, some time before any sale would be made, with more specific information as to what equipment and facilities would be sold. That the said T. H. Clements did not at any time thereafter request of Affiant any inventory of the equipment or facilities, or any information as to what items of facilities or equipment were available for sale, or any information as to the nature or quantity of any thereof.

F. I. McGahan

Subscribed and sworn to before me this 18th day of February, 1942.

[Seal]

Chas. A. Root,

Notary Public in and for said County and State.

Received copy of the within this 18th day of Feb., 1942. Philip N. Krasne (R. P.).

[Endorsed]: Filed Feb. 19, 1942.



At a stated term, to-wit: The February Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 24th day of February in the year of our Lord one thousand nine hundred and forty-two.

Present:

The Honorable Harry A. Hollzer, District Judge.

No. 1718-H Civil

Aaron Ferer & Sons,

Plaintiff,

vs.

Richfield Oil Corporation, a corporation,

Defendant.

This cause coming on for further hearing on motion of plaintiff for Summary Judgment, or if denied, for a Bill of Particulars, pursuant to notice filed January 30, 1942; Philip N. Krasne and Carl B. Sturzenacker, Esqs., appearing as counsel for the plaintiff; Robert E. Paradise, Esq., appearing as counsel for the defendant; and H. A. Dewing, Court Reporter, being present and reporting the proceedings:

At 10:40 A. M. Attorney Paradise requests that certain corrections be made to defendant's answer and said corrections are made by the Court.

Attorney Paradise argues further in opposition to said motion, and Attorney Krasne argues further in support of said motion.

At 12:10 P. M. court recesses to 3 P. M. in this case. At 3:25 P. M. court reconvenes herein, and all being present as before, Attorney Krasne resumes argument in support of said motion and Attorney Paradise argues further in opposition to said motion. Attorney Paradise asks that the defendant be allowed to file motion for Summary Judgment. Attorney Krasne makes a statement in opposition thereto as Bill of Particulars has not been furnished to plaintiffs on defendant's counter-claim.

Attorney Paradise makes a statement.

It is ordered that the demand of plaintiffs for a Bill of Particulars is deemed covered by the statement of defendant's counsel and shall be ruled as complied with by the statement in open court and plaintiffs are allowed seven days to file reply to defendant's counter-claim, and it is further ordered that both sides file, within seven days, an outline of the points of their argument, and that the cause be, and it hereby is, continued to March 4, 1942, for submission on motion of plaintiffs for Summary Judgment, the defendant to file its motion of Summary Judgment in meantime if it is deemed advisable.

[Title of District Court and Cause.]

REPLY.

Comes now the above named plaintiff and answering the alleged first cause of action set forth in defendant's counter claim and cross complaint on file herein, admits, denies and alleges as follows:

I.

Denies that on or about January 17, 1941, or at any time, plaintiff and defendant orally agreed to the sale by defendant to plaintiff of producing and refining facilities and equipment which were located on the premises owned by defendant. Denies that plaintiff and defendant entered into any oral agreement with respect to the producing and refining facilities and equipment, which are the subject of the sale provided for in the written contract between plaintiff and defendant dated January 17, 1941, a copy of which is attached to the amended complaint on file herein, and alleges that the only agreement made or entered into between plaintiff and defendant with respect to the sale by defendant to plaintiff of producing and refining facilities and equipment is the said written contract dated January 17, 1941.

Denies that plaintiff and defendant did not intend that the subject matter of the sale of producing and refining facilities and equipment by defendant to plaintiff should include any casing or pipe installed in any of the wells located upon said premises, and alleges that plaintiff and defendant did intend that the subject matter of said sale should include the casing or pipe installed in all of the wells located upon said premises.

Denies that plaintiff at and prior to the time of the execution of said written contract did not intend to purchase the casing or pipe installed in any of the oil wells located upon said premises, and denies that plaintiff did not intend to do or perform the abandonment work on said wells in the manner required by Section 3233 of the California Public Resources Code, and alleges that plaintiff at and prior to the time of the execution of the written contract did intend to purchase the casing or pipe installed in all of the said oil wells and did intend to do or perform the abandonment work on such wells in the manner required by law and by the terms of the said written contract.

Denies that defendant did not intend to sell plaintiff the casing or pipe installed in the said oil wells, and alleges that defendant prior to and at the time of the execution of said written contract did intend to sell to plaintiff said casing and pipe installed in all of said oil wells.

Plaintiff has no information or belief concerning the value of the alleged reservoir of oil underlying defendant's premises, and basing this denial upon such lack of information or belief denies that same has a value of approximately Three Million Dollars, or any value whatsoever.

Admits that during the year preceding the date of the execution of said written contract dated January 17, 1941, defendant removed from said wells the derricks, tubing and rods installed therein, but denies that such removal was deemed advisable because of the worn condition there-

of, and alleges that such removal was deemed advisable because defendant had no intentions of ever operating said wells.

Denies that said wells were ever capped at the surface in order that such wells in the future might be re-opened and re-entered for the production of oil therefrom, and alleges that defendant had no intention of re-opening and re-entering said wells, or any of them, for the production of oil.

Denies that defendant at all or any of the times mentioned in defendant's counter claim and cross complaint intended to produce oil from such wells at any time.

Plaintiff has no information or belief concerning defendant's allegations of the cost of drilling and installing casing in wells on the premises, and basing its denial upon the lack of such information and belief, denies that the cost thereof would be not less than Fifteen Thousand Dollars per well, and denies that the cost in the aggregate would be not less than Four Hundred and Eighty Thousand Dollars.

Denies that in the preparation of said written contract dated January 17, 1941, the parties thereto inadvertently or otherwise, or by mistake or otherwise, omitted to state that the subject matter thereof was limited to such producing and refining facilities and equipment as were located on the surface of said premises and/or that the subject matter did not include the casing or pipe installed in any of the oil wells located upon said premises, and alleges

that said written contract dated January 17, 1941, properly and correctly sets forth the intentions of the parties thereto, and alleges that it was the intention of the parties thereto that defendant sell to plaintiff all producing and refining facilities and equipment of every kind and nature except the items therein specifically reserved, and that it was the intention of the parties thereto that defendant sell to plaintiff the casing or pipe installed in all of the oil wells located on said premises.

Denies that said written contract dated January 17, 1941, fails to express the intention of the parties thereto.

Denies that defendant has at all times fully done and performed all of the terms, covenants, conditions and agreements to be performed by defendant under said written contract dated January 17, 1941, and alleges that defendant breached said written contract by refusing to permit plaintiff to remove the casing or pipe from the oil wells on said premises.

Answering The Alleged Second Cause Of Action Set Forth In Defendant's Counter Claim And Cross-Complaint On File Herein:

## I.

Plaintiff repeats by reference all of the denials, admissions and allegations contained in plaintiff's Reply to defendant's alleged first cause of action as fully as if herein set forth at length.

## II.

Denies that in the preparation of said written contract dated January 17, 1941, the defendant inadvertently or

otherwise or by mistake omitted to state that the subject matter thereof was limited to such producing and refining facilities and equipment as were located on the surface of the premises and/or that it did not include the casing or pipe installed in any of the oil wells located upon said premises.

Denies that in said respect, or in any respect, the written contract dated January 17, 1941, fails to express the intention of the parties thereto.

Denies that at the time of the execution of said written contract dated January 17, 1941, or at any time prior thereto, plaintiff knew or suspected that defendant did not intend to sell to plaintiff the casing or pipe installed in any of the oil wells located on said premises and/or that defendant intended the subject matter of said written contract be limited to producing and refining facilities which were located on the surface of said premises and/or that said written contract failed in such respect, or any respect, to express the intention of the parties thereto.

Wherefore, plaintiff prays that defendant's counter claim and cross complaint be dismissed; that defendant be denied any relief thereunder; and that all costs herein be taxed against defendant and in favor of plaintiff.

PHILIP N. KRASNE and  
CARL B. STURZENACKER

By Philip N. Krasne  
Attorneys for Plaintiff.

[Verified.]

[Endorsed]: Filed Mar. 5, 1942.

At a stated term, to-wit: The February Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 6th day of March in the year of our Lord one thousand nine hundred and forty-two.

Present:

The Honorable: Harry A. Hollzer, District Judge.

No. 1718-H Civil.

Aaron Ferer & Sons,

Plaintiff,

**vs.**

Richfield Oil Corporation, a corporation,

Defendant.

This cause coming on for submission after hearing on motion of plaintiff for Summary Judgment, pursuant to notice filed January 30, 1942: It is ordered that the cause stand submitted on motion of the plaintiff for Summary Judgment.

It is further ordered that the cause be, and it hereby is, continued to April 6, 1942, for setting.



[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY  
JUDGMENT.

To the Plaintiff, Aaron Ferer & Sons, and to Philip N. Krasne, Esq., and Carl B. Sturzenacker, Esq., Attorneys for the Plaintiff:

Please take notice that on the 16th day of March, 1942, at the opening of Court on such day, or as soon thereafter as counsel can be heard, there will be brought on for hearing the attached Motion of defendant for a Summary Judgment in defendant's favor upon defendant's two causes of action for reformation contained by way of counterclaim or cross-complaint in defendant's answer to the amended complaint herein.

Dated: March 6, 1942.

ROBERT E. PARADISE  
WILLIAM J. DeMARTINI

By Robert E. Paradise  
Attorneys for Defendant Richfield Oil Corporation.

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[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT.

To the Honorable United States District Court above named:

Defendant Richfield Oil Corporation moves the Court for a Summary Judgment in favor of defendant and against plaintiff as to all matters contained in defendant's two causes of action for reformation as set forth by way of counterclaim or cross-complaint in defendant's answer to plaintiff's amended complaint herein.

Said Motion is made upon the following grounds:

1. On March 5, 1942, plaintiff filed its reply to said two causes of action of counterclaim and cross-complaint set forth in defendant's answer to the amended complaint herein.

2. That it appears from all of the records and files in the above entitled case, and particularly from

(a) The affidavit of H. H. Kelly filed herein on February 17, 1942;

(b) The affidavit of Harold Davis filed hereon on February 17, 1942;

(c) The affidavit of F. I. McGahan filed herein on February 17, 1942;

(d) The further affidavit of F. I. McGahan filed herein on February 19, 1942;

(e) The deposition of T. H. Clements (on file herein);

(f) The deposition of Morris Ferer (on file herein); and

(g) The deposition of David Zeidenfeld (on file herein),

that

(1) The defendant Richfield Oil Corporation at all times during the negotiations and up to and including the date of the contract intended that the subject matter of the sale be limited to the equipment and facilities located upon the surface of the land and Richfield Oil Corporation did not intend that the casing in the wells be included in the subject matter of such sale or that any of such wells be abandoned.

(2) The plaintiff knew or suspected that Richfield Oil Corporation did not intend to sell any of the casing in the wells or to have any of such wells abandoned.

(3) During the negotiations for the contract and at the time of the execution of the contract, plaintiff Aaron Ferer & Sons did not intend to purchase under such contract the casing installed in such wells or intend to perform the abandonment work on such wells in the manner required by Section 3233 of the Public Resources Code, which would be necessary in connection with the removal of casing from such wells. The plaintiff intended to abandon only such of the wells as should prove profitable to be abandoned and accordingly to remove only the casing from such profitable wells,

and that there is no genuine issue as to any material fact herein and that defendant Richfield Oil Corporation is entitled, as a matter of law, to a judgment reforming the written contract dated January 17, 1941 in accordance with the prayer therefor in defendant's answer to the amended complaint herein.

Said Motion will be made under Rule 56 of the Federal Rules of Civil Procedure and based upon the affidavits and depositions referred to hereinabove and upon all of the records and files in the above entitled case.

Dated: March 6, 1942.

ROBERT E. PARADISE  
WILLIAM J. DeMARTINI

By Robert E. Paradise

Attorneys for Defendant Richfield Oil Corporation.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND  
AUTHORITIES.

A party seeking to recover upon a counterclaim or cross-claim may, at any time after the pleading and answer thereto has been served, move for a Summary Judgment in his favor upon all or any part thereof. The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56 Federal Rules of Civil Procedure.

Dated:    March 6, 1942.

ROBERT E. PARADISE  
WILLIAM J. DeMARTINI

By Robert E. Paradise

Attorneys for Defendant Richfield Oil Corporation.

Received copy of the within this 6th day of March, 1942.  
Philip N. Krasne (R. P.).

[Endorsed]:    Filed Mar. 6, 1942.

At a stated term, to-wit: The February Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 16th day of March in the year of our Lord one thousand nine hundred and forty-two.

Present:

The Honorable: Harry A. Hollzer, District Judge.

No. 1718-H Civil.

Aaron Ferer & Sons,

Plaintiff,

vs.

Richfield Oil Corp.,

Defendant.

This cause coming on for hearing motion of defendant for Summary Judgment, pursuant to notice filed March 6, 1942; Philip N. Krasne, Esq., appearing as counsel for the plaintiff; Robert E. Paradise, Esq., appearing as counsel for the defendant;

Attorney Paradise makes a statement. It is ordered that the defendant file a certain memorandum by March 19, 1942, and that plaintiff file reply within two days, and that the cause stand submitted.

At a stated term, to-wit: The February Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 29th day of June in the year of our Lord one thousand nine hundred and forty-two.

Present:

The Honorable: Harry A. Hollzer, District Judge.

No. 1718-H Civil.

Aaron Ferer & Sons, a co-partnership,

Plaintiff,

vs.

Richfield Oil Corporation,

Defendant.

It appearing that plaintiff has filed a motion for summary judgment, or if denied, for a bill of particulars, that since the filing of said motion various affidavits have been filed on behalf of defendant in opposition to said motion and that in addition thereto several depositions have been taken on behalf of defendant, also that defendant has filed a motion for summary judgment upon the two causes of action set forth by way of counterclaim or cross-complaint in its answer, and good cause appearing therefor, it is ordered that plaintiff's motion be, and the same is, denied.

It is further ordered that the submission of defendant's motion for summary judgment is vacated.

At a stated term, to-wit: The February Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 1st day of July in the year of our Lord one thousand nine hundred and forty-two.

Present:

The Honorable: Harry A. Hollzer, District Judge.

No. 1718-H Civil.

Aaron Ferer & Sons,

Plaintiff

vs.

Richfield Oil Corporation,

Defendant

This cause coming on ex parte, Philip N. Krasne, Esq., appearing for the plaintiff, Robert E. Paradise, Esq., appearing for the defendant; the Court and counsel discuss the minute order of June 29, 1942, and the Court makes a suggestion regarding the coming trial of this cause.

Pursuant to stipulation of counsel, it is ordered that this case be set for trial on the merits; that at the trial the affiants that signed various affidavits in connection with the respective motions for summary judgment be deemed to have testified on direct examination on the matters stated in the affidavits, subject to cross-examination, provided, that the affiants are produced for cross-examination; and, also, that the deponents, whose depositions have

have been taken, be deemed to have testified to the answers given on the taking of their respective depositions, subject likewise to cross-examination without restriction because of those same witnesses having been previously examined upon cross-examination and it is further ordered that proper objections to questions in the depositions may be made at the trial.

Attorney Krasne asks that the Court make a ruling on defendant's motion for Summary Judgment which is now pending.

The Court states that it appearing that issues of fact have been raised on defendant's motion for Summary Judgment, it is ordered, that upon that ground alone, said motion be, and it is, denied.

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[Title of District Court and Cause.]

Memorandum of Conclusions,

Judge Hollzer, May 29, 1943.

It appearing that by the amended complaint filed herein plaintiff sought relief in the alternative, that is to say, in the first count thereof plaintiff sought declaratory relief adjudging the rights and duties of the parties litigant with respect to the subject matter of said pleading, and in the second count thereof sought a judgment awarding monetary damages for alleged breach of contract; and

It further appearing that this suit is founded upon a certain written contract executed by plaintiff and defendant, and that a copy of said contract is attached to the amended complaint and marked "Exhibit A" therein; and



It further appearing that heretofore defendant submitted a motion to dismiss said pleading and also to dismiss each of the counts thereof, and that thereafter the court entered an order denying said motion to dismiss the amended complaint but granting defendant's motion to dismiss the first count, without leave to amend, granting defendant time within which to serve and file its answer to the second count, said order having been made upon certain grounds all as more particularly set forth in the court's memorandum of conclusions rendered and filed herein; and

It further appearing that thereafter defendant filed its answer and counterclaim or cross-complaint herein, that by its answer defendant has placed in issue many of the material allegations of the second count of the amended complaint and, in addition, as a further defense and by way of a first cause of action under its counterclaim or cross-complaint, defendant has sought reformation of said contract upon the ground of mutual mistake, that is to say upon the ground that at the time of and immediately preceding the execution of said written contract the parties litigant had entered into an oral agreement of sale by defendant to plaintiff, upon certain terms and conditions and for the sum of \$22,000, of certain producing and refining facilities and equipment located on the surface of certain premises owned by defendant, also that said parties did not intend that the subject matter of said contract should include any casing in any of the wells on said premises and that by mutual mistake said written contract failed to express such intention and oral agreement

of the parties; also as a further defense and by way of a second cause of action under its counterclaim or cross-complaint defendant has sought reformation of said contract upon the ground of its own mistake in omitting to state therein that the subject matter of said contract was limited to the producing and refining facilities located on the surface of said premises, that the subject matter of said contract did not include the casing in the wells on said premises, also that plaintiff knew or suspected defendant's intention in that regard, and that said written contract failed to express such intention; and

It further appearing that thereafter plaintiff filed a notice of motion for summary judgment herein, or for a bill of particulars should the latter motion be denied, that subsequently certain depositions were taken on behalf of defendant preparatory to opposing plaintiff's motion for summary judgment, that said depositions and in addition several affidavits were filed on behalf of defendant in opposition to plaintiff's motion for summary judgment, that thereafter defendant filed a motion for summary judgment, that plaintiff's motion for summary judgment was made upon the affidavit of one Morris Ferer, one of the members of the plaintiff co-partnership, and also upon the records and filed herein, and that defendant's motion for summary judgment was based upon two causes of action of its counter-claim or cross-complaint, and the aforementioned affidavits filed on its behalf and also upon the depositions of said Morris Ferer and of one T. H. Clements and also the deposition of one David Zeidenfeld; and

It further appearing that thereafter plaintiff's motion for summary judgment was denied and that an order was

made to the effect that plaintiff's demand for a bill of particulars shall be deemed covered and as having been complied with by the statement made by defendant's counsel in open court, also that thereafter an order was made denying defendant's motion for summary judgment solely upon the ground that issues of fact had been raised in opposition to defendant's motion; and

It further appearing that thereafter a trial was had upon the merits; and

It further appearing that plaintiff contends:

(1.) That the contract sued upon is clear and unambiguous upon its face and by the terms thereof the property sold to plaintiff included the casing in the oil wells upon defendant's premises at Casmalia, Santa Barbara County.

(2.) That since no uncertainty or ambiguity with respect to the intentions of the parties appears on the face of the written contract, no parol evidence is necessary or proper to aid in its construction;

(3.) That even if the court should decide that parol evidence is necessary and proper to aid in the construction of said written contract, the preponderance of such evidence supports plaintiff's contention that defendant has sold to it the casing in said oil wells.

(4.) That defendant has failed to establish any oral agreement to conform to which said written contract can be reformed.

(5) That defendant has failed to establish any mistake in said written contract.

(6) That even if the evidence establishes that a mistake was made in the wording of said written contract, such mistake was the result of defendant's gross negligence.

It further appearing that in support of its first two contentions above outlined plaintiff relies primarily, if not altogether, upon the views expressed by the court in its memorandum of conclusions hereinbefore mentioned; and

It further appearing that during the course of the trial the court declared that a doubt had been raised respecting the proper construction of said written contract; and

It further appearing that throughout the negotiations antecedent to, and likewise at the time of the execution of said contract plaintiff was represented by said M. Ferer, assisted by said Clements; and

It further appearing that four of defendant's employees namely, R. D. Montgomery, (manager of defendant's production department) H. H. Kelly, (director of defendant's purchasing department) Harold Davis, (his assistant buyer) and F. I. McGahan, (defendant's supervisor of storehouses) participated either directly or indirectly in the negotiations antecedent to the execution of said contract, and that one or more of them represented defendant at the time said contract was executed; and

It further appearing that prior to and at the time of the execution of said contract all of said employees of defendant knew that none of the oil wells upon its Casmalia property was to be abandoned, that likewise they had been instructed that only surface equipment on said premises was to be sold, that none of them intended to sell any of the oil well casing in said wells, and that no other employee of defendant carried on any of the negotiations leading up to the execution of said contract; and

It further appearing that the expression "surface equipment" is a term in common use in the oil industry, that the same means equipment located upon the surface and includes pipe lines, even though a portion thereof extends underground and that casing in an oil well is not classified in the oil industry as surface equipment but is commonly referred to as sub-surface equipment; and

It further appearing that said Clements had received a university education particularly in petroleum technology, that he had specialized in work of that character, also that he had had considerable experience in the oil industry, was familiar with the nature of the work involved in the abandonment of oil wells, and in addition knew that defendant's oil field at Casmalia had not been depleted, but that oil had not been produced therefrom during a period of many years; and

It further appearing that throughout the period during which negotiations were conducted leading up to the making of said contract and also at the time of the execution thereof the aforementioned Zeidenfeld was in the employ of plaintiff, that during said antecedent negotiations he obtained from one McGahan, an employee of defendant, information to the effect that defendant proposed to sell certain equipment and facilities located upon its Casmalia property in Santa Barbara County, also that such equipment and facilities comprised what are included in the oil industry in the classification of property known as surface equipment, that the same would weigh approximately 1500 tons, that the nature and quantity thereof could be ascertained by visual inspection thereof upon said premises, also that thereafter such information was conveyed by Zeidenfeld to said Ferer, that thereafter and during such

antecedent negotiations similar information was given by said McGahan to said Ferer and also to said Clements, that the latter became associated with plaintiff in carrying out the aforementioned contract and acquired an interest therein, that is to say acquired a one-third interest in any profits and agreed to pay a corresponding percentage of any losses arising out of the performance of said contract, also that said McGahan informed Ferer that he had no inventory of the property proposed to be sold but that he was willing to meet him on said premises and there point out the particular equipment and facilities which defendant proposed to sell; and

It further appearing that during the summer of 1940 Clements learned that defendant was having work performed on the wells upon its land at Casmalia, that such work included the removal of derricks, also the removal of tubing and rods from said wells and capping the wells at the surface, but without abandoning the same; and

It further appearing that prior to the execution of said contract Ferer and Clements visited said premises and made a visual inspection of the surface equipment thereon, that neither upon the occasion of said visit nor at any other time, did plaintiff or anyone representing it make any inspection to ascertain the length or the size or the weight or the condition of the casing in the oil wells upon said premises, that likewise at the time of executing said contract plaintiff was not informed respecting the number of such wells or the length or the size or the weight or the condition of the casing therein, nor had plaintiff ascertained or secured any estimate of the cost of abandoning any of such wells; and

It further appearing that at the time of executing said contract plaintiff did not know whether the condition of

any of the wells upon said premises was such that the cost of abandoning the same would exceed the value of any salvage recoverable by abandonment; and

It further appearing that during the negotiations antecedent to the execution of said contract defendant's employee named Davis pointed out to Ferer and Clements on a certain map of said premises (a copy of which map is attached to said contract) the gas line running from one of the wells on said premises to the superintendent's house, also stated to them that defendant would exclude such pipe line from the proposed sale and further called attention to the fact that if sufficient gas to serve the superintendent's house were not obtained from such well it might be necessary to exclude from the proposed sale gas pipe lines running from other wells, and that at the time of the execution of said contract plaintiff did not know the number of wells from which gas lines extended; and

It further appearing that during the negotiations antecedent to the execution of said contract, defendant's employee named Davis informed Ferer and Clements that defendant intended to use the wells on said Casmalia property for the future production of oil and for that reason declined to include in the proposed sale the six large storage tanks referred to in Paragraph I, subparagraph (f) of said contract; and

It further appearing that neither during the negotiations antecedent to the execution of said contract nor at the time of executing same was any mention made of abandoning any of the wells upon said premises or of removing any casing therefrom; and

It further appearing that casing cannot safely be removed from an oil well without abandoning the same and

without complying with the requirements of the California Division of Oil and Gas regulating the abandonment of oil wells; and

It further appearing that no inquiry was made by or on behalf of plaintiff of the California Division of Oil and Gas respecting what requirements and regulations thereof must be complied with in the matter of abandoning any wells or removing any casing from any wells upon defendant's land at Casmalia, nor did plaintiff know what such requirements or regulations were; and

It further appearing that in said contract, more particularly in Paragraph I, subdivision (h) thereof, it is provided that among the items of equipment and facilities excepted from the sale are "gas pipe lines, connecting wells on the land above described to the superintendent's house (Tr. 1494)" that upon the map attached as Exhibit A to said contract there appears a notation in red reading "and any extensions of gas line necessary to furnish gas to Duncan's house"; and

It further appearing that if the parties to said contract had intended to include among the articles sold the casing in such wells, it would have been obligatory on the part of plaintiff, in connection with the dismantling, removal and disposition of all equipment sold, to remove the casing from all such wells and for that purpose to abandon the same, whereas plaintiff never intended to abandon such wells and did not understand that the provisions of said contract required it to perform such work or dealt with that subject matter;



The Court Concludes that throughout the negotiations antecedent to and at the time of the execution of said contract defendant intended that the subject matter of the sale be limited to the equipment and facilities located upon the surface of its Casmalia property; that defendant did not intend that the casing in any of the wells upon said property be included in the subject matter of said sale or that any of said wells be abandoned.

The Court Further Concludes that prior to and at the time of the execution of said contract plaintiff knew or suspected that defendant did not intend to sell the casing in any of the wells upon said property or to have any of said wells abandoned.

The Court Further Concludes that during the negotiations antecedent to and at the time of the execution of said contract plaintiff did not intend to purchase under such contract the casing in the aforementioned wells or to perform the abandonment work on such wells in the manner required by law and which would be necessary in connection with the removal of casing from such wells.

The Court Further Concludes that defendant is entitled to relief by way of appropriate reformation of said contract.

The Court further concludes that plaintiff is not entitled to recover any relief herein.

[Endorsed]: Filed May 29, 1943.

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Saturday the 29th day of May in the year of our Lord one thousand nine hundred and forty-three.

Present:

The Honorable: Harry A. Hollzer, District Judge.  
No. 1718-H Civil.

Aaron Ferer & Sons, a co-partnership,

Plaintiff,

vs.

Richfield Oil Corporation, a corporation,

Defendant.

For the reasons set forth in the memorandum of conclusions this day filed, it is ordered that counsel for defendant prepare and submit findings and decree in conformity therewith, serving a copy upon opposing counsel.

Copies to counsel.

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[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED AMENDMENTS TO  
FINDINGS OF FACT AND CONCLUSIONS OF  
LAW.

Comes Now the plaintiff and respectfully submits that the proposed findings of fact and judgment heretofore submitted by defendant herein should be amended as follows:

I.

Re Finding No. 7:

The following sentence should be added: "Neither said R. D. Montgomery or H. H. Kelly, however, were ever

in direct communication with plaintiff or any representative of plaintiff at the time said contract was executed or during any of the antecendent negotiations.”

II.

Re Finding No. 8:

The following should be added: “On December 10, 1940 plaintiff submitted a written offer to defendant relating said property to and including loading *rach* adjacent to premises above described (Plaintiff’s Exhibit No. 2), said offer was in the following language:

“December 10, 1940

Richfield Oil Corporation  
555 South Flower Street  
Los Angeles, California

Attention: Mr. H. E. Davis, Purchasing Department  
Gentlemen:

We are pleased to submit our bid in the sum of Twenty-Two Thousand Dollars (\$22,000.00), to cover all tanks, pipe, valves, fittings, buildings, boilers, and all other materials now situated on your Casmalia refining and producing property, plus pipe line running from the aforesaid property to and including loading *rach* adjacent to the railroad track, one-half mile west, including boiler and other incidental materials. We exclude the following items:

Superintendent’s house, garage and building now used as a cow barn;

Main incoming water line, and such line as needed to supply house and cow barn,

Six large steel storage tanks, approximately 50,000 barrels each,

Six shell stills, plus one shell still bottom previously sold to the O. C. Fields Company,

Certain 4 inch tubes previously sold to the West Coast Oil Company.

Cashier's Check in the sum of Twenty-Two Thousand Dollars, (\$22,000.00), will be paid you within Ten (10) days after notification of acceptance of this bid.

Bidder desires six months' time within which to remove all of the above-mentioned merchandise; retains the privilege of leaving any brick, galvanized tanks and other debris which is not useable; but guarantees not to create any hazards for cattle by creating any pitfalls, other than those which now exist.

Hoping to have an immediate acceptance, favoring us with this material, we remain

Very truly yours,

AARON FERER & SONS

By

Morris Ferer

L.

c.c. Mr. Clemens

Refinery Equipment Co."

Prior to the date of said written offer there had been no meeting of the minds between plaintiff and defendant with respect to the sale of any of the equipment at said premises.

On January 2, 1941, defendant executed and delivered to plaintiff a written acceptance of plaintiff's said offer (Plaintiff's Exhibit No. 3), said acceptance was in the following language:

“RICHFIELD OIL CORPORATION

Richfield Building — Los Angeles — California

January 2, 1941

Paid 1/7/41

#12530

Aaron Ferer & Sons

5585 East 61st St.

Los Angeles, Calif.

Attention: Mr. Morris Ferer

Gentlemen:

Confirming our telephone conversation of today, we hereby accept your offer, dated December 10th, in the amount of \$22,000.00, for all tanks, pipe, valves, fittings, buildings, boilers, tank car loading facilities and other material and equipment belonging to Richfield, located on our Soladino Lease in Casmalia, with the following exceptions:

Superintendent's house, garage and building now used as a cow barn.

Main water line and pipe line necessary to supply house and cow barn.

Six steel storage tanks, Co. Nos. PR-29230, 29231, 29238, 29239, 29240, 29241.

Six shell stills and two still bottoms, including connections and such firebrick at the location of the stills required by O. C. Field Gasoline Co.

Tubes and other equipment at the Retort previously purchased by the Mid-Coast Oil Company.

Twelve dehydrators belonging to Petroleum Rectifying Co.

It is agreed that you will furnish us with Cashier's Check in the amount of \$22,000.00, within ten days after date of this letter and that all tanks will be removed and debris disposed of and pits and ditches filled in, leaving property in a good clean usable condition.

Very truly yours,

RICHFIELD OIL CORPORATION

(Signed) H. H. KELLY

H. H. KELLY, Purchasing Agent

HED:ad''

Between the date of plaintiff's said written offer and defendant's said written acceptance there were no oral conversations whatsoever between plaintiff and defendant relating to said sale, except that prior to the date of defendant's acceptance, Harold Davis, defendant's assistant buyer, told Morris Ferer that defendant was accepting plaintiff's said offer.

On January 8, 1941, defendant delivered its check in in the sum of Twenty-two Thousand Dollars (\$22,000.00) to plaintiff and concurrently therewith defendant, through said, Harold Davis, prepared and delivered to plaintiff a written memorandum relating to said sale; said written memorandum was in the following language:

“Sale Of Material And Equipment At Casmalia  
To Aaron Ferer and Sons, 5585 E. 61st St., Los Angeles  
Payment: Cashier's or Certified Check in the amount of  
\$22,000.00, payable in advance.

Material purchased for resale, Purchaser to be allowed six months for removal.

Everything will be sold to the above with the exception of the following:

1. 12 dehydrators belonging to Petroleum Rectifying Co.
2. Water pump, water storage facilities and water piping which services Superintendent's house and cow barn.
3. Superintendent's house and garage, frame house PR-17318.
4. Six shell stills and 2 extra still bottoms, including connections which are affixed thereto up to and including the first flange in the piping hook-up.  
(Previously sold to O. C. Field Gasoline Company)
5. Material and equipment sold to the Mid-Coast Oil Company, not yet removed from the property.
6. 6 tanks, Nos. PR-29230—Capacity 55,000 barrels
 

29231	“	“	“
29238	“	5,700	“
29239	“	10,050	“
29240	“	30,190	“
29241	“	37,250	“

Purchaser shall remove all oil in tanks from the property, debris to be disposed of on the property by placing in the washed-out portions of a creek running through the Refining Property in such a manner that the normal course of the stream is not restricted.

The two large sumps on the North side of the above referred to creek across from the Refinery should be properly fenced, using salvage pipe for post and sand line for wire to prevent cattle from getting bogged down in the sumps during wet weather.

All ditches and pits should be filled in after removal of pipe and other equipment and left in safe condition.

Concrete buildings and foundations on the Refinery Property will not constitute a hazard and therefore can be left in place.

HED:ad

Jan. 8, 1941"

Between the date of plaintiff's offer and the date of said written memorandum, defendant did not, through any of its employees or representatives, tell plaintiff that defendant intended to sell only "surface equipment" or that defendant did not intend to sell the casing in the oil wells. During said period the words, "surface equipment", or the word "casing" were never mentioned in any conversation between any representative of defendant and any representative of plaintiff.

### III.

Re Finding No. 11:

The first eleven words thereof ("during the negotiations and prior to the execution of the contract") should be deleted and there should be substituted in lieu thereof, the following: "On January 8, 1941, after plaintiff had delivered to defendant the Twenty-Two Thousand Dollars (\$22,000.00) payment, pursuant to plaintiff's written offer and defendant's written acceptance, and after the delivery by defendant to plaintiff of the written memorandum dated January 8, 1941."

### IV.

Re Finding No. 12:

The first eleven words thereof ("during the negotiations and prior to the execution of the contract") should be deleted and there should be substituted in lieu thereof, the following: "Some days after January 8, 1941.



There should also be added at the end of Finding No. 12 the following sentence: "Except for the considerations provided for in plaintiff's written offer and defendant's written acceptance, there was no consideration to support plaintiff's consent to exclude from the sale any gas line or gas lines running from any of the wells to the superintendent's house and the value of such gas lines to plaintiff as salvage was comparatively trivial."

V.

Re Finding No. 13:

The following sentence should be added: "Said F. I. McGahan made said statement to said T. H. Clements some time prior to the date of plaintiff's written offer, but did not repeat it at any time between the date of said written offer and the date of the execution of the contract."

VI.

Re Finding No. 14:

The following should be added: "Said F. I. McGahan made said statement to said M. Ferer some time prior to the date of plaintiff's written offer, but did not repeat it at any time between the date of said written offer and the date of the execution of the contract." "Neither said F. I. McGahan or any other representative of defendant met said M. Ferer, or any other representative of plaintiff, on said Casmalia premises, nor did said F. I. McGahan, nor any other representative of defendant ever point out to said M. Ferer, or any other representative of plaintiff the particular equipment and facilities which defendant proposed to sell.

## VII.

Re Finding No. 16:

The following should be added: "At the time of the making of said statements by F. I. McGahan to said David Zeidenfeld, and at the time of the conversation between said Zeidenfeld and M. Ferer, said Zeidenfeld believed that it was defendant's desire to sell all of its equipment at its Casmalia premises. Said Zeidenfeld at said times also believed that the equipment at said premises consisted only of refinery equipment and that the fifteen-hundred ton estimate of said F. I. McGahan related only to refinery equipment."

## VIII.

Re Finding No. 17:

The following should be added: "At the time said David Zeidenfeld told said M. Ferer that if plaintiff was interested in buying Richfield's equipment, plaintiff would have to bid somewhere in the amount of \$20,000.00, said Zeidenfeld did not mean that a bid in such amount would have to be made because of said F. I. McGahan's estimate of the tonnage. Said Zeidenfeld had inferred from his conversations with F. I. McGahan that unless a lump sum bid were made in some such amount defendant would sell its equipment in individual quantities rather than in bulk."

## IX.

Re Finding No. 18:

Grtd The last sentence of the first paragraph of said finding (page 8, lines 2 to 6) should be deleted.

Den. The following sentence should be added: "Said

T. H. Clements also knew that the reason oil had not been produced at said field for a period of many years was that the production of oil from said field had not been profitable because of the poor quality of such oil and the abnormal cost of producing it."

X.

Re Finding No. 30:

This finding should be deleted in its entirety and the following should be substituted in lieu thereof: "Under the provisions of said written contract, dated January 17, 1941, as executed, the subject matter of the sale included the casing in the oil wells located on defendant's said Casmalia premises."

XI.

Paragraph III of the proposed judgment should be corrected by deleting therefrom as a taxable item of cost the cost of the original transcript furnished to the Court. It is our recollection that the cost of the said transcript was to be, and has heretofore in fact been paid fifty percent (50%) by defendant and fifty percent (50%) by plaintiff.

Respectfully submitted,

PHILIP N. KRASNE

CARL B. STURZENACKER

By Carl B. Sturzenacker

Counsel for Plaintiff.

PNK:J  
7/12/43

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jul. 12. 1943.

[Title of District Court and Cause.]

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S  
PROPOSED AMENDMENTS TO FINDINGS  
OF FACT AND CONCLUSIONS OF LAW.

Defendant objects in the following respects to the amendments proposed by plaintiff to the Findings of Fact and Conclusions of Law:

I.

Re proposed amendment No. I to finding No. 7.

Defendant does not object to the proposed amendment if it is limited to R. D. Montgomery.

However, the proposed amendment to the effect that H. H. Kelly was not "ever in direct communication with plaintiff or any representative of plaintiff" is not supported by the record. H. H. Kelly signed a letter to plaintiff (plaintiff's Exhibit No. 3); and also signed the contract with plaintiff (plaintiff's Exhibit No. 4); and H. H. Kelly also had a conversation with M. Ferer and T. H. Clements (Tr. pp. 152, 153).

II.

Re proposed amendment No. II to finding No. 8.

Defendant objects to the entire proposed amendment No. II to finding No. 8 on the following grounds:

(1) The matters stated in plaintiff's proposed amendment No. II have no relation to finding No. 8 and are not pertinent thereto.

(2) There is no occasion for quoting verbatim in the Findings any of the exhibits introduced into evi-

dence inasmuch as such exhibits would become a part of the record on appeal. If any of the exhibits are to be included in the Findings all exhibits which were introduced in evidence should be included in the Findings.

(3) If plaintiff's offer, dated December 10, 1940 (plaintiff's Exhibit 2) and defendant's acceptance, dated January 2, 1941 (plaintiff's Exhibit 3) and the memorandum dated January 8, 1941 (plaintiff's Exhibit 1) are referred to in the Findings of Fact, there must also be a finding of fact that neither the defendant's acceptance (plaintiff's Exhibit 3) nor the Davis memorandum (plaintiff's Exhibit 1) was understood by either plaintiff or defendant to create a contractual relationship between the parties on the terms stated in such documents. The parties contemplated that a formal contract covering the proposed sale had to be prepared and executed. The documents referred to were merely a part of the negotiations between the parties and further negotiations took place between the parties subsequent to both documents and up to the date of signing the written contract of January 17, 1941 (plaintiff's Exhibit 4). M. Ferer understood that the Davis memorandum (plaintiff's Exhibit 1) constituted only the "nucleus or the basis the contract would be drawn on." Many additional changes in the transaction and additional terms were added subsequent to December 10, 1940 and January 2, 1941. (Ferer's Dep. p. 246, line 3, to p. 249, line 13).

(4) There is no support in the record for the proposed findings:

- (a) "Between the date of plaintiff's said written offer and defendant's said written acceptance there were no oral conversations whatsoever between plaintiff and defendant relating to said sale, except that prior to the date of defendant's acceptance, Harold Davis, defendant's assistant buyer, told Morris Ferer that defendant was accepting plaintiff's said offer.", (p. 4, lines 26-31 of plaintiff's proposed amendments) or
- (b) "Between the date of plaintiff's offer and the date of said written memorandum, defendant did not, through any of its employees or representatives, tell plaintiff that defendant intended to sell only 'surface equipment' or that defendant did not intend to sell the casing in the oil wells. During said period the words, 'surface equipment', or the word 'casing' were never mentioned in any conversation between any representative of defendant and any representative of plaintiff." (p. 6, lines 15-22 of plaintiff's proposed amendments)

The dates of the various conversations were not all fixed by the testimony with such definiteness to warrant the amendments to the findings proposed by plaintiff. More importantly, the amendments proposed by plaintiff attempt to give a particular significance to the period occurring between the date of plaintiff's offer and the date of the written memorandum of January 8, 1941. The record does not warrant any emphasis upon, or significance to, such period inasmuch as the period prior thereto and the period subsequent thereto, were all parts of the same negotiations.

## III.

Re proposed amendment No. III to finding No. 11.

Defendant objects to the deletion of the phrase "during the negotiations and prior to the execution of the contract." Finding No. 11 is completely supported by the record, and in addition was specifically referred to in the same language in the Court's memorandum of conclusions dated May 29, 1943, at page 7, lines 22-29.

If the phrase "during the negotiations and prior to the execution of the contract" is permitted to remain in finding No. 11, defendant does not object to an addition to the findings to the effect that the statement of H. Davis to M. Ferer and to T. H. Clements occurred on January 8, 1941; but defendant does object to the argumentative language proposed by the plaintiff, to wit,

"after plaintiff had delivered to defendant the Twenty-Two Thousand Dollars (\$22,000.00) payment, pursuant to plaintiff's written offer and defendant's written acceptance, and after the delivery by defendant to plaintiff of the written memorandum dated January 8, 1941." (p. 6, lines 28-32 of plaintiff's proposed amendments)

for the reasons:

(1) That such language constitutes an attempt to modify the Court's finding that the negotiations continued up until the execution of the contract on January 17, 1941, and

(2) It does not appear from the record whether the statement of Harold Davis concerning the six large storage tanks occurred before or after plaintiff delivered the \$22,000.00 check, or before or after Davis delivered the written memorandum dated January 8, 1941.

## IV.

Re proposed amendment No. IV to finding No. 12.

Defendant objects to the deletion of the phrase "during the negotiations and prior to the execution of the contract" for the same reasons outlined in connection with proposed amendment No. III. If such phrase is permitted to remain in finding No. 12, defendant does not object to the finding also stating that such conversation occurred between January 8, 1941 and the date of the execution of the contract.

Defendant objects to the proposed addition at the end of finding No. 12 of the following:

"Except for the considerations provided for in plaintiff's written offer and defendant's written acceptance, there was no consideration to support plaintiff's consent to exclude from the sale any gas line or gas lines running from any of the wells to the superintendent's house and the value of such gas lines to plaintiff as salvage was comparatively trivial." (p. 7, lines 8-14 of plaintiff's proposed amendments) on the following grounds:

(1) Plaintiff's proposed amendment is an attempt to establish that the negotiations were concluded on January 2, 1941 (the date of defendant's written acceptance), which is contrary to the record and to the Court's conclusions that the negotiations continued up to January 17, 1941, the date of the execution of the contract, and

(2) Inasmuch as exclusion of the gas lines was a part of the entire transaction, there was no necessity for any separate consideration for such exclusion.



## V.

Re proposed amendment No. V to finding No. 13.

Defendant objects to the proposed amendment on the ground that it is purely argumentative. Since the Court has found as a fact that the statement was made (Court's memorandum of conclusions, p. 6-a, lines 3-5), there is no occasion to impugn such finding by matters which go solely to the probative value of the evidence upon which the Court based such finding. Furthermore, there is no requisite in law or business dealings that a statement once made must, to have any significance, be repeated once or any additional number of times.

## VI.

Re proposed amendment No. VI to finding No. 14.

Defendant objects to the proposed amendments on the ground that they are argumentative, and upon the same grounds listed in connection with proposed amendment No. V hereinabove. Defendant also objects to the proposed amendment,

“Neither said F. I. McGahan or any other representative of defendant met said M. Ferer, or any other representative of plaintiff, on said Casmalia premises, nor did said F. I. McGahan, nor any other representative of defendant ever point out to said M. Ferer, or any other representative of plaintiff the particular equipment and facilities which defendant proposed to sell.” (p. 7, line 28 to p. 8, line 2 of plaintiff's proposed amendments)

on the ground that such a finding is not warranted inasmuch as no request was made of F. I. McGahan to meet M. Ferer, or any other representative of plaintiff, on the premises and point out the particular equipment to be

sold, notwithstanding that McGahan had offered to M. Ferer to make such trip.

## VII.

Re proposed amendment No. VII to finding No. 16.

Defendant objects to the proposed amendment on the ground that the same is not supported by the record, in view of the testimony of Zeidenfeld and McGahan. [Tr. p. 254, lines 11-25; Tr. p. 227, lines 18, to p. 229, line 1; Tr. p. 261, line 18, to p. 262, line 2.]

## VIII.

Re proposed amendment No. VIII to finding No. 17.

Defendant objects to the proposed amendment on the ground that whatever reason the said Zeidenfeld had in his own mind for suggesting to M. Ferer that the latter bid the sum of \$20,000.00, which reason was not disclosed by Zeidenfeld to M. Ferer, is completely immaterial inasmuch as the significance of the conversation between Zeidenfeld and Ferer concerning the sum of \$20,000.00 was the knowledge and notice which M. Ferer received from such conversation in view of the fact that Zeidenfeld had already told M. Ferer that the tonnage involved was approximately 1500 tons, and in view of the further fact that plaintiff's bid following the receipt of such information, was approximately the same amount suggested to M. Ferer by Zeidenfeld.

## IX.

Re proposed amendment No. IX to finding No. 18.

The last sentence of the first paragraph of finding No. 18 should not be deleted. It is thoroughly supported by the record. (Tr. p. 311, lines 15-19.)

Defendant also objects to the proposed amendment concerning the knowledge of T. H. Clements on the ground

that the testimony of T. H. Clements was largely untrustworthy, as evidenced by the constant impeachments of his testimony by use of his deposition.

X.

Re proposed amendment No. X to finding No. 30.

Defendant objects to the deletion of this finding or the substitution of the amendment proposed by plaintiff.

At the trial the Court stated that the proper construction of the contract had not been finally determined. The same view is expressed in the Court's memorandum of conclusions dated May 29, 1943, p. 5, lines 10-12. As stated in finding No. 30, it is unnecessary to make any finding concerning the construction or interpretation of the contract, in view of the findings of the Court concerning reformation. Any finding at this time concerning the interpretation of the contract would be anomalous.

XI.

Defendant objects to the suggested amendment to paragraph III of the proposed judgment. The Court's order was that the cost of the original transcript, the Court's copy, would be divided between the parties equally at the time of the trial, but that the amount thereof would be taxed as costs. (Tr. pp. 215, 216) Paragraph III of the proposed judgment incorporates such ruling with exactness.

Respectfully submitted,

ROBERT E. PARADISE

WILLIAM J. DeMARTINI

By Robert E. Paradise

Attorneys for Defendant.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jul. 20, 1943.

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS.

Judge Hollzer's Calendar, October 28, 1943.

It appearing that a memorandum of conclusions rendered herein by the Court has been filed and that pursuant thereto proposed findings and judgment have been drafted, served and submitted by counsel for defendant; and

It further appearing that counsel for plaintiff has served and filed proposed amendments to the same; and

It further appearing that counsel for defendant has served and filed objections to such proposed amendments, and the same having been considered;

The Court Concludes that plaintiff's proposed amendments numbered I, II, III, IV, V, VI, VII, VIII, X, and XI are each and all without merit and should be refused, save and except as follows:

There shall be added to Finding No. 7 the following sentence: "Said R. D. Montgomery was never in direct communication with plaintiff or any representative of plaintiff at the time said contract was executed or during any of the antecedent negotiations."

There shall be added to finding No. 11 the following sentence, to-wit: "Said statement by Harold Davis to M. Ferer and to T. H. Clements occurred on January 8, 1941."

There shall be added to finding No. 12 the following sentence, to-wit: "Such conversation between Harold Davis, M. Ferer and T. H. Clements occurred between January 8, 1941, and the date of the execution of the contract."

The Court Further Concludes that the last sentence of the first paragraph of finding No. 18 is argumentative and should be deleted.

The Court Further Concludes that the remaining portion of plaintiff's proposed amendment No. IX is without merit and should be refused.

Copies to counsel.

[Endorsed]: Filed October 28, 1943.

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At a stated term, to-wit: The September Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 28th day of October in the year of our Lord one thousand nine hundred and forty-three.

Present:

The Honorable Harry A. Hollzer, District Judge.

No. 1718-H

Aaron Ferer & Sons, a co-partnership,

Plaintiff.

vs.

Richfield Oil Corporation,

Defendant.

For the reasons set forth in the memorandum of conclusions this day filed,

It Is Ordered that counsel for defendant prepare, serve and submit to the Court revised findings in accordance therewith.

Copies to counsel.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled action came on regularly for trial on September 3, 1942. Evidence oral and documentary was introduced by the respective parties. In addition, pursuant to stipulation and order of this Court made on July 1st, 1942, various affidavits and depositions, which were filed in connection with the respective motions for summary judgment in this action, were admitted in evidence at the trial subject to cross examination of the affiants and deponents and subject to proper objections at the trial to questions in the depositions. By order of this Court at the trial the deposition of one David Zeidenfeld was eliminated from the scope of said order of this Court of July 1, 1942 and such deposition was not admitted in evidence. Briefs having been filed by the respective parties and the Court, having carefully considered the evidence and the arguments of counsel and having filed its Memorandum of Conclusions under date of May 29, 1943 and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Rules of Civil Procedure:

### Findings of Fact.

1. Plaintiff copartnership and the respective copartners thereof are citizens of the State of California and the defendant Richfield Oil Corporation is a corporation organized and existing under the laws of the State of Delaware and a citizen of said State.

2. The controversy between plaintiff and defendant is of a civil nature at law or equity and involves a sum in

excess of Three Thousand Dollars (\$3,000) exclusive of interest and cost.

3. Prior to January 17, 1941 defendant, as Seller, and plaintiff, as Buyer, made an agreement for the sale, for the sum of Twenty-two Thousand Dollars (\$22,000), of certain refinery and producing facilities and equipment located on land at Casmalia, California, owned by defendant, and plaintiff agreed, among other things, to perform at its sole cost and expense certain work in connection therewith, which work included the dismantling, removal and disposition of all equipment and facilities to be purchased by the plaintiff thereunder. The equipment and facilities to be sold consisted of various pipe lines, boilers, buildings, pumps, tanks, motors, engines and scrap metal scattered over the property. Various items of facilities and equipment were expressly excluded from such sale, including, among other things, gas pipe lines connecting wells on the land to the superintendent's house and six (6) large storage tanks (having capacities of from fifty-seven hundred (5700) barrels to fifty-five thousand (55,000) barrels, respectively) and major suction and discharge oil pipe lines connecting such tanks.

4. To evidence such agreement, plaintiff and defendant executed a written contract dated January 17, 1941 (Plaintiff's Exhibit No. 4).

5. The written contract dated January 17, 1941, did not truly express the agreement or the intention of plaintiff and defendant in that it did not expressly provide (1) that the subject matter of the sale did not include the casing in any of the oil wells located on the land; and (2) that the plaintiff had no obligation, as a part of the work plaintiff agreed to perform under such contract, to abandon

such oil wells or dismantle or remove or dispose of the casing contained therein.

6. Throughout the negotiations antecedent to and likewise at the time of the execution of the contract, plaintiff was represented by M. Ferer, assisted by T. H. Clements.

7. Four of defendant's employees, namely, R. D. Montgomery (Manager of defendant's Production Department), H. H. Kelly (Director of defendant's Purchasing Department), Harold Davis (his assistant buyer), and F. I. McGahan (defendant's supervisor of storehouses) participated either directly or indirectly in the negotiations antecedent to the execution of said contract and one or more of them represented defendant at the time said contract was executed.

Said R. D. Montgomery was never in direct communication with plaintiff or any representative of plaintiff at the time said contract was executed, or during any of the antecedent negotiations.

8. The negotiations antecedent to the execution of said contract occupied a period of several months prior to the execution of the contract. During said negotiations and at the time of the execution of said contract, all of said employees of defendant knew that none of the oil wells upon defendant's Casmalia property was to be abandoned. Such employees had been instructed that "surface equipment" on said premises was to be sold. Neither defendant nor any of said employees intended to sell to plaintiff any of the oil well casing in any of said wells. Neither defendant nor any of said employees of defendant intended that any of the oil wells be abandoned or that any casing be removed from any of such wells. Casing cannot safely



be removed from an oil well without complying with the requirements of the California Division of Oil and Gas regulating the abandonment of oil wells.

9. The various wells on the Casmalia property were drilled and produced oil from 1917 to 1925. At the time production of oil from such wells was discontinued in 1925 the oil pool underlying the land had not been depleted. Defendant and its predecessors in interest from time to time subsequent to 1929, made studies of the problem of reopening the field for the production of oil from such wells. During 1940, a few months prior to the negotiations between plaintiff and defendant, defendant employed a contractor to remove the worn derricks, tubing and rods from such wells because of the hazardous condition thereof but care was taken in connection with such work that the wells be not abandoned and that the casing in the wells be not tampered with and that the wells be capped at the surface in order that the wells might in the future be reopened and reentered for the production of oil therefrom.

At the time such worn derricks, tubing and rods were removed and during the negotiations and at the time of the execution of the contract between plaintiff and defendant, defendant was of the opinion and belief that such derricks, tubing and rods and the pipe lines, boilers, pumps and other equipment and facilities sold under such contract would not be suitable or desirable for use in connection with defendant's proposed new method of operation at such time as defendant reopened the field for the production of oil from such wells. During 1940 and prior to the execution of said contract, defendant ran instruments into the wells and from such operation learned that

the casing therein was sufficient to hold back the formations penetrated by the wells.

10. Plaintiff and plaintiff's employees who represented plaintiff in the negotiations and execution of the contract knew and suspected prior to and at the time of the execution of said contract that defendant did not intend to sell the casing in any of the wells on the Casmalia property or to have any of said wells abandoned.

11. During the negotiations and prior to the execution of the contract, defendant's employee, Harold Davis, told both the said M. Ferer and the said T. H. Clements that defendant intended to use the wells on the Casmalia property for the future production of oil and for that reason declined to include in the proposed sale, as requested by the said M. Ferer and T. H. Clements, the six (6) large storage tanks referred to in paragraph 1, subparagraph (f) of the written contract dated January 17, 1941. Said statement by Harold Davis to M. Ferer and to H. H. Clements occurred on January 8, 1941.

12. During the negotiations and prior to the execution of the contract, the said Harold Davis pointed out to the said M. Ferer and the said T. H. Clements on a certain map of the Casmalia premises (a copy of which map is attached as Exhibit "A" to said contract) the gas line running from one of the wells on the premises to the superintendent's house, which house was excluded from the sale, and Harold Davis stated to the said M. Ferer and T. H. Clements that defendant desired to exclude such pipe line from the proposed sale in order that the superintendent's house, which was excluded from the sale, could continue to receive gas from such well. Such conversation between Harold Davis, M. Ferer and T. H. Clements

occurred between January 8, 1941 and the date of the execution of the contract. At the same time the said Harold Davis also informed the said M. Ferer and T. H. Clements that if there was not gas in such well sufficient to serve the superintendent's house, it might be necessary to exclude from the proposed sale gas lines running to other wells on the property in order to insure sufficient gas supplies to the superintendent's house. At the time of the execution of the contract plaintiff did not know the number of wells to which gas lines extended.

Paragraph 1, subparagraph (h) of the written contract dated January 17, 1941, provides that among the items of equipment and facilities excepted from the sale are "gas pipe lines connecting wells on the land above described to the superintendent's house (P. R. 1494)." Upon the map attached as Exhibit "A" to said contract there appears a notation in red reading: "and any extensions of gas lines necessary to furnish gas to Duncan's house."

13. Prior to the execution of said contract the said T. H. Clements became associated with plaintiff in carrying out the said contract and acquired an interest therein, that is to say, said Clements acquired a one-third ( $1/3$ ) interest in any profits and agreed to pay a corresponding percentage of any losses arising out of the performance of said contract.

During the said negotiations and prior to the execution of the contract the said F. I. McGahan stated to the said T. H. Clements that the facilities and equipment which defendant proposed to sell were "surface equipment."

14. During the negotiations and prior to the execution of the contract the said F. I. McGahan stated to the said

M. Ferer that the equipment to be sold by Richfield was "surface equipment" and that the said F. I. McGahan had no inventory of the property proposed to be sold but that he was willing to meet the said M. Ferer on the said Casmalia premises and there point out the particular equipment and facilities which defendant proposed to sell.

15. The expression "surface equipment" is a term in common use in the oil industry, which term means equipment located upon the surface of the land and includes pipe lines even though a portion thereof extends underground. Casing in an oil well is not classified or referred to in the oil industry as "surface equipment" but is commonly referred to as "subsurface equipment."

16. David Zeidenfeld was in the employ of plaintiff throughout the period during which the negotiations were conducted leading up to the making of said contract and also at the time of the execution thereof. During the negotiations and prior to the execution of such contract the said Zeidenfeld discussed the proposed sale with F. I. McGahan, one of defendant's employees. The said Zeidenfeld was told by F. I. McGahan that defendant proposed to sell certain equipment and facilities located on its Casmalia property in Santa Barbara County; also that such equipment and facilities comprised "surface equipment"; that the same would weigh approximately fifteen hundred (1500) tons and that the nature and quantity thereof could be ascertained by visual inspection thereof on the premises.

On the same evening following the said David Zeidenfeld's conversation with the said F. I. McGahan, the said Zeidenfeld reported to the said M. Ferer that defendant's estimate of the equipment was roughly fifteen hundred

(1500) tons of which nine hundred (900) tons was pipe and six hundred (600) tons was steel. This report to M. Ferer occurred prior to the date of plaintiff's written offer to defendant dated December 10, 1940 (Plaintiff's Exhibit 2).

17. Subsequent to the report to M. Ferer concerning the estimate of tonnage, the said David Zeidenfeld told the said M. Ferer that if plaintiff was interested in buying Richfield's equipment, plaintiff would have to bid somewhere in the amount of Twenty Thousand Dollars (\$20,000). This conversation likewise occurred prior to the date of plaintiff's written offer to defendant dated December 10, 1940 (Plaintiff's Exhibit 2).

18. During the summer of 1940 and shortly before the commencement of the negotiations for the contract, the said T. H. Clements visited defendant's Casmalia property and learned that the defendant was having work performed on the wells on its land at Casmalia, and that such work included the removal of derricks, tubing and rods from said wells. At the same time, the said T. H. Clements also learned that the wells were being capped at the surface but that the wells were not being abandoned or the casing removed.

The said T. H. Clements had received a University education, particularly in petroleum technology, and had specialized in work of that character. He had had considerable experience in the oil industry and was familiar with the nature of the work involved in the abandonment of oil wells. He was familiar with defendant's Casmalia oil field and knew that oil had not been produced therefrom during a period of many years, but he also knew

that the oil reservoir at Casmalia had not been depleted at the time the production of oil from such wells was discontinued.

19. Prior to the execution of said contract the said M. Ferer and T. H. Clements visited the Casmalia premises and made a visual inspection of the surface equipment thereon. Neither upon the occasion of such visit, nor at any other time, did plaintiff, or anyone representing plaintiff, make any inspection to ascertain the length, or the size, or the weight, or the condition of the casing in the oil wells upon the Casmalia premises. Likewise, at the time of executing said contract plaintiff was not informed respecting the number of such wells, or the length, or the size, or the weight, or the condition of the casing therein, nor had plaintiff ascertained or secured any estimate of the cost of abandoning any of such wells.

At the time of executing said contract plaintiff did not know and had made no effort to ascertain whether the condition of any of the wells upon the said Casmalia premises was such that the cost of abandoning the same would exceed the value of any salvage recoverable by abandonment.

20. At no time prior to the execution of said contract was any inquiry made by or on behalf of plaintiff of the California Division of Oil and Gas respecting what requirements and regulations thereof must be complied with in the matter of abandoning any wells or removing any casing from any wells upon defendant's land at Casmalia and at the time of executing said contract plaintiff did not know what such requirements or regulations were.

21. At no time during the negotiations antecedent to the execution of said contract or at the time of executing the same, was there any discussion or mention made be-

tween plaintiff or plaintiff's employees or representatives and defendant or defendant's employees or representatives of abandoning any of the wells upon said Casmalia premises or of removing any casing therefrom.

22. If the parties to said contract had intended to include the casing in such wells among the equipment and facilities to be sold thereunder, it would have been obligatory on the part of plaintiff, in connection with its obligation of "the dismantling, removal and disposition of all equipment and facilities to be purchased" under such contract, to remove the casing from all such wells and for that purpose to abandon all of such wells. The plaintiff never intended to abandon such wells and did not understand or consider that the provisions of said contract required plaintiff to perform such work or dealt with that subject matter.

23. Throughout the negotiations antecedent to and at the time of the execution of said contract, defendant intended that the subject matter of the sale be limited to the equipment and facilities located upon the surface of its Casmalia property; and defendant did not intend that the casing in any of the wells upon the property be included in the subject matter of said sale or that any of said wells be abandoned.

24. Throughout the negotiations antecedent to and at the time of the execution of said contract, plaintiff had both knowledge and suspicion that defendant did not intend to sell the casing in any of the wells upon the Casmalia property or to have any of said wells abandoned.

25. The failure of the written contract dated January 17, 1941, to express truly the intention of the parties to the contract resulted from the mistake of the defendant

which the plaintiff knew and suspected at the time of the execution of the contract.

26. During the negotiations antecedent to and at the time of the execution of said contract, plaintiff did not intend to purchase under such contract the casing in the aforementioned wells or to perform the abandonment work on such wells in the manner required by law which would be necessary in connection with the removal of casing from such wells.

27. During the negotiations antecedent to and at the time of the execution of said contract, defendant did not intend to assume any obligation to the plaintiff under such contract to perform the abandonment work on the aforementioned wells in the manner required by law and did not understand or consider that it would have any such obligation.

28. The failure of the written contract dated January 17, 1941, to express truly the intention of the parties to the contract resulted from a mutual mistake of the parties thereto.

29. The mistake, consisting of the failure of said written contract to expressly provide (1) that the subject matter of the sale did not include the casing in any of the oil wells located on the land; and (2) that the plaintiff had no obligation, as a part of the work plaintiff agreed to perform under such contract, to abandon such oil wells or dismantle or remove or dispose of the casing contained therein, was not caused by or the result of negligence on the part of the defendant.

30. In view of the foregoing findings, it is unnecessary to make any finding concerning the proper construction or interpretation of said written contract dated January 17,



1941, either on its face or in the light of the surrounding circumstances.

31. There are no rights acquired by any third persons which would be prejudiced by a reformation of said written contract dated January 17, 1941.

Conclusions of Law. .

1. This Court has jurisdiction of the parties and of the subject matter of this action.

2. The written contract dated January 17, 1941, did not truly express the intention of the plaintiff and defendant in that it did not expressly provide (1) that the subject matter of the sale did not include the casing in any of the oil wells located on the land; and (2) that the plaintiff had no obligation, as a part of the work plaintiff agreed to perform under such contract, to abandon such oil wells or dismantle or remove or dispose of the casing contained therein.

3. The failure of the written contract dated January 17, 1941, to express truly the intention of the parties to the contract resulted from a mutual mistake of the parties thereto.

4. The failure of the written contract dated January 17, 1941, to express truly the intention of the parties to the contract resulted from the mistake of the defendant which the plaintiff knew and suspected at the time of the execution of the contract.

5. Defendant is entitled to have said written contract reformed to expressly provide (1) that the subject matter of the sale did not include the casing in any of the oil wells located on the land; and (2) that the plaintiff had no obligation, as a part of the work plaintiff agreed to per-

form under such contract, to abandon such oil wells or dismantle or remove or dispose of the casing contained therein.

6. In order to effectuate the agreement and intention of the parties, it is proper to add to said written contract dated January 17, 1941, the following paragraph as paragraph 15 thereof:

"15. The subject matter of this contract does not include the casing in any of the wells located upon Seller's land and the casing in such wells is expressly excluded from the equipment and facilities to be sold by Seller to Buyer hereunder.

Buyer shall have no obligation as a part of Buyer's work hereunder to abandon any of such wells, or dismantle, or remove or dispose of the casing contained therein; and Buyer shall not abandon any of said wells, or dismantle, or remove, or dispose of the casing contained therein."

7. Plaintiff is not entitled to have or recover anything from the defendant. Defendant is entitled to recover of and from the plaintiff its costs and disbursements herein.

Done in Open Court This 16 Day of November, 1943.

H. A. Hollzer

United States District Judge

Approved as to form.

PHILIP N. KRASNE and  
CARL B. STURZENACKER

By Carl B. Sturzenacker

Attorneys for Plaintiff

[Endorsed]: Filed Nov. 16, 1943.

In the District Court of the United States, Southern  
District of California, Central Division.

No. 1718-H

AARON FERER & SONS, a Co-partnership,

Plaintiff,

vs.

RICHFIELD OIL CORPORATION,

Defendant.

### JUDGMENT.

The above entitled action having been tried and the Court having filed its opinion herein and entered its Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Rules of Civil Procedure, and being advised in the premises, upon consideration thereof.

It Is Hereby Ordered, Adjudged and Decreed as follows:

#### I.

That the plaintiff take nothing by its action.

#### II.

That pursuant to defendant's counterclaims the written contract between plaintiff and defendant, dated January 17, 1941, be and the same is hereby reformed by the addition of the following paragraph as paragraph 15 thereof:

"15. The subject matter of this contract does not include the casing in any of the wells located upon Seller's land and the casing in such wells is expressly excluded from the equipment and facilities to be sold by Seller to Buyer hereunder.

Buyer shall have no obligation as a part of Buyer's work hereunder to abandon any of such wells, or dismantle, or remove or dispose of the casing contained therein; and Buyer shall not abandon any of said wells, or dismantle, or remove, or dispose of the casing contained therein."

### III.

That defendant recover its costs and disbursements herein from the plaintiff, to include the reporter's per diem fee and the cost of the original transcript furnished to the Court, to be taxed by the Clerk in the amount of ..... Dollars (\$164.80).

Dated: November 16, 1943.

H. A. Hollzer

United States District Judge

Approved as to Form.

PHILIP N. KRASNE and

CARL B. STURZENACKER

By Carl B. Sturzenacker

Attorneys for Plaintiff

Judgment Entered Nov. 16, 1943. Docketed Nov. 16, 1943. C. O. Book 22, Page 44. Edmund L. Smith, Clerk, By L. Wayne Thomas, Deputy.

[Endorsed]: Filed Nov. 16, 1943.

[Title of District Court and Cause.]

NOTICE OF APPEAL.

Notice is Hereby Given that Aaron Ferer & Sons, the plaintiff above-named, hereby appeals to the Circuit Court of Appeals of the United States for the Ninth Circuit from the final judgment entered November 26, 1942 and from the whole of said judgment.

Dated: This 26th day of January, 1944.

CARL B. STURZENACKER and  
PHILIP N. KRASNE

By Carl B. Sturzenacker  
Attorneys for Plaintiff and Appellant.

[Affidavit of Service by Mail.]

\$500 Bond Filed

[Endorsed]: Filed & mailed copy to Robert E. Paradise & William J. De Martini, Defts. Attys. Feb. 8, 1944.

PACIFIC INDEMNITY COMPANY

M. R. Johnson, President

Los Angeles

San Francisco

621 South Hope Street

100 Sansome Street

Bond No. 113920

In the District Court of the United States, Southern  
District of California, Central Division.

No. 1718-H Civil

AARON FERER & SONS, a co-partnership,

Plaintiff,

vs.

RICHFIELD OIL CORPORATION, a corporation,  
Defendant.

COST BOND ON APPEAL.

Know All Men by These Presents, That Pacific Indemnity Company, a corporation organized and existing under the laws of the State of California, and duly licensed to transact business in the State of California, is held and firmly bound unto Richfield Oil Corporation, a corporation, defendant in the above entitled suit, in the penal sum of Five Hundred & No/100 Dollars (\$500.00), to be paid to the said Richfield Oil Corporation, a corporation, its heirs, executors, administrators, successors and assigns, for which payment, well and truly to be made, the Pacific Indemnity Company binds itself, its successors and assigns firmly by these presents.

Sealed with our seals and dated this 3rd day of February, A. D. 1944.

The Condition of the above obligation is such that whereas, the said Aaron Ferer & Sons, Plaintiff in the above entitled suit, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from a decree made, rendered and entered on the 17th day of November, 1943, by the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause.

Now, Therefore, the condition of the above obligation is such that if Aaron Ferer & Sons shall prosecute its said appeal to effect and answer all costs which may be adjudged against it if it fail to make good its appeal, then this obligation shall be void; otherwise to remain in full force and effect.

PACIFIC INDEMNITY COMPANY

By W. C. Bening  
Attorney-in-Fact

Examined and recommended for approval as provided in Rule.

Carl B. Sturzenacker  
Attorney

I Hereby Approve the foregoing bond Dated the .....  
day of February, 1944.

.....  
Judge or Clerk

[Verified.]

[Endorsed]: Filed Feb. 8, 1944.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL.

To the Clerk of the District Court of the United States,  
Southern District of California, Central Division:

Appellant, plaintiff in the above-entitled action, designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in the above-entitled action:

1. Complaint;
2. Notice of Petition for Removal to United States District Court;
3. Petition for Removal to United States District Court with memorandum attached;
4. Bond on Removal;
5. Order approving foregoing bond;
6. Order for Removal to United States District Court;
7. Amended Complaint;
8. Defendant's motion to Dismiss Amended Complaint;
9. Affidavit of H. H. Kelley in Support of said motion to dismiss;
10. Order that said motion to dismiss be submitted;
11. Court's memorandum of conclusions and minute order denying motion to dismiss second count of amended



complaint and granting motion to dismiss first count without leave to amend;

12. Answer to amended complaint and defendant's counter claim and cross complaint thereto;

13. Plaintiff's motion for summary judgment, or if denied, for bill of particulars;

14. Affidavit of Morris Ferer and memoranda of points and authorities in support of the foregoing motion for summary judgment or bill of particulars;

15. Petition of defendants for order granting leave to take depositions of Morris Ferer and T. H. Clements;

16. Affidavit of Robert E. Paradise in support of said petition to take depositions;

17. Order for taking depositions of Morris Ferer and T. H. Clements;

18. Defendant's notice of taking deposition of David Zeidenfeld;

19. Affidavit of Robert E. Paradise re taking deposition of David Zeidenfeld;

20. Order shortening time for taking deposition of said Zeidenfeld;

21. Depositions of T. H. Clements and Morris Ferer (filed February 24, 1942);

22. Deposition of David Zeidenfeld (filed February 23, 1942);

23. Affidavit of F. I. McGahan, H. H. Kelly and Harold Davis in opposition to plaintiff's motion for summary judgment or bill of particulars;

24. Further affidavit of F. I. McGahan re plaintiff's last named motion;

25. Plaintiff's reply to defendant's counter claim and cross complaint;

26. Order that case stand submitted on motion of plaintiff for summary judgment;

27. Defendant's notice of motion for summary judgment;

28. Order, stands submitted, on motion of plaintiff for summary judgment;

29. Order denying plaintiff's motion for summary judgment or bill of particulars and vacating order submitting defendant's motion for summary judgment;

30. Order case stand submitted on merits;

31. Memorandum of conclusions and findings for defendant (May 29, 1943);

32. Minute order that defendant's counsel prepare findings and decree;

33. Plaintiff's proposed amendments to findings and conclusions of law;

34. Defendant's objections to the foregoing proposed amendments;

35. Memorandum of court's conclusions re proposed findings and conclusions of law;

36. Minute order that defendant's counsel submit revised findings;

37. Findings of fact and conclusions of law;

38. Order that said findings and conclusions be filed;

39. Judgment (November 16, 1943);
40. Plaintiff's notice of appeal with date of filing;
41. Cost bond with date of filing;
42. Two volumes of reporter's transcript of trial, being a complete record of the entire trial (September 3, 4, 9, 10, 11, 1942);
43. Plaintiff's exhibits 1, 2, 3 and 4, as filed;
44. Defendant's exhibits a, b, and c.

CARL B. STUZENACKER and  
PHILIP N. KRASNE,

By Carl B. Sturzenacker

Attorneys for Plaintiff.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Feb. 16, 1944.

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[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL  
PORTION OF THE RECORD TO BE CON-  
TAINED IN THE RECORD ON APPEAL.

To the Clerk of the District Court of the United States,  
Southern District of California, Central Division.

Appellee, defendant in the above entitled action, files this designation of the following additional portion of the record to be contained in the record on appeal in the above entitled action:

1. Defendant's Motion for Summary Judgment, filed March 6, 1942.

(Appellant's original designation of the record contained as item No. 27 thereof "Defendant's Notice of Motion for Summary Judgment". Appellant's amended designation of the record, filed March 1, 1944, contained the following: "Item No. 27—Defendant's notice of motion for summary judgment—may be deleted".)

Dated: March 2, 1944.

ROBERT E. PARADISE  
WILLIAM J. DeMARTINI  
By Robert E. Paradise

Attorneys for Appellee, Richfield Oil Corporation.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 2, 1944.

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[Title of District Court and Cause.]

APPELLANT'S AMENDED DESIGNATIONS OF  
THE RECORD, PROCEEDINGS AND EVIDENCE  
TO BE CONTAINED IN THE RECORD  
ON APPEAL.

To the Clerk of the District Court of the United States,  
Southern District of California, Central Division.

Appellant, plaintiff, in the above-entitled action, files this amended designations of the following portions of the record, proceedings and evidence to be contained in the record on appeal in the above-entitled action, and by this notice amends the original designation by deleting and amending the description of the following items:

Item No. 9—Affidavit of H. H. Kelly—may be deleted;

Item No. 27—Defendant's notice of motion for summary judgment—may be delited;

Item No. 30—Order case stand submitted—by amendment to read, "Order that the case be set for trial on its merits" in place and stead of the designation set forth therein.

CARL B. STURZENACKER &

PHILIP N. KRASNE

By CARL B. STURZENACKER

Attorneys for Appellant.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 2, 1944.

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[Title of District Court and Cause.]

STIPULATION WAIVING RULE FOR FILING  
TWO COPIES OF THE REPORTER'S TRAN-  
SCRIPT AND TWO COPIES OF REPORTED  
DEPOSITION.

It Is Hereby Stipulated by and between counsel for appellant and counsel for respondent that the rule of Court providing for the filing with the Clerk of two copies of the reporter's transcript and two copies of the reported deposition is hereby waived.

It Is Further Stipulated that the copy of the reporter's transcript now on file and the copy of the deposition now on file may be forwarded by the Clerk of the Dis-

trict Court to the Clerk of the Circuit Court of Appeals for the purpose of printing the transcript in the above matter.

Dated: This 15 day of March, 1944.

Philip N. Krasne,  
Carl B. Sturzenacker,  
Attorneys for Appellant.

Robert E. Paradise,  
Attorney for Respondent.

Upon Reading and Filing the within Stipulation and good cause appearing therefrom,

It Is Hereby Ordered that the rule requiring two copies of the reporter's transcript and the deposition be waived and that the transcript and deposition now on file may be used by the Clerk of the District Court to forward to the Clerk of the Circuit Court of Appeals, for the purpose of printing the transcript in the above matter.

March 17, 1944.

H. A. Hollzer,  
Judge.

[Endorsed]: Filed Mar. 17, 1944.

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME FOR THE  
CLERK TO PREPARE TRANSCRIPT ON  
APPEAL.

It Is Hereby Stipulated by and between counsel for the appellant and counsel for the respondent in the above-entitled matter that due to the necessity of having the clerk prepare a transcript and forward the same to the Clerk of the Circuit Court of Appeals and the time being short that the time for the Clerk to prepare and forward the transcript to the Clerk of the Circuit Court of Appeals is hereby extended to and including the 18th day of April, 1944.

Dated: This 15 day of March, 1944.

CARL B. STURZENACKER  
PHILIP N. KRASNE

By Carl B. Sturzenacker  
Attorneys for Appellants.

Robert E. Paradise  
Attorney for Respondent.

Upon Reading and Filing the within Stipulation and good cause appearing therefrom,

It Is Hereby Ordered that the time for the Clerk to prepare and file transcript on appeal is extended to the 18th day of April, 1944.

March 17, 1944.

H. A. Hollzer,  
Judge.

[Endorsed]: Filed Mar. 17, 1944.

[Title of District Court and Cause.]

## CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 242 inclusive contain full, true and correct copies of: Complaint Declaratory Judgment; Notice of Filing of Petition for Removal and Bond and Notice of Application for an Order Granting Removal to the District Court of the United States, in and for the Southern District of California, Central Division & Petition for Removal; Petition for Removal to the District Court of the United States for the Southern District of California, Central Division; Bond on Removal; Minute Order of the Superior Court dated July 15, 1941; Order for Removal of Cause to the United States District Court; Clerk's Certificate to Removal Papers; Amended Complaint Declaratory Judgment; Motion to Dismiss Amended Complaint and Notice of Motion; Minute Order Entered November 17, 1941; Memorandum of Conclusions Dec. 29, 1941; Minute Order Entered December 29, 1941; Answer to Amended Complaint; Motion of Plaintiff for Summary Judgment or if denied, for Bill of Particulars and Notice of Motion; Petition for Leave to Take the Depositions of Morris Ferer et al with Affidavit of Robert E. Paradise in Support; Affidavit of Robert E. Paradise; Order; Notice of Taking Deposition of David Zeidenfeld; Affidavit of Robert E. Paradise; Minute Order Entered February 12, 1942; Affidavit of F. I. Mc-



Gahan in Opposition to Plaintiff's Motion for Summary Judgment or for Bill of Particulars; Affidavit of H. H. Kelly in Opposition to Plaintiff's Motion for Summary Judgment or for Bill of Particulars; Affidavit of Harold Davis in Opposition to Plaintiff's Motion for Summary Judgment or for Bill of Particulars; Further Affidavit of F. I. McGahan in Opposition to Plaintiff's Motion for Summary Judgment or for Bill of Particulars; Minute Order Entered February 24, 1942; Reply; Minute Order Entered March 6, 1942; Motion of Defendant for Summary Judgment and Notice of Motion; Minute Orders Entered March 16, 1942 and June 29, 1942 respectively; Minute Order Entered July 1, 1942; Memorandum of Conclusions May 29, 1943; Minute Order Entered May 29, 1943; Plaintiff's Exhibits 1, 2, 3 and 4; Defendant's Exhibits A, B and C; Plaintiff's Proposed Amendments to Findings of Fact and Conclusions of Law; Defendant's Objections to Plaintiff's Proposed Amendments to Findings of Fact and Conclusions of Law; Memorandum of Conclusions October 28, 1943; Minute Order Entered October 28, 1943; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Cost Bond on Appeal; Appellant's Designations of the Record, Proceedings and Evidence to be Contained in the Record on Appeal; Appellee's Designation of Additional Portion of the Record to be Contained in the Record on Appeal; Appellant's Amended Designations of the Record, Proceedings and Evidence to be contained in the Record on Appeal; Stipulation and Order Waiving Rule for Filing

Two Copies of the Reporter's Transcript and Two Copies of Reported Deposition; and Stipulation and Order Extending Time for the Clerk to Prepare Transcript on Appeal and Docket Appeal which, together with the Original Reporter's Transcript and Original Depositions of David Zeidenfeld, T. H. Clements and Morris Ferer constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$102.35 which sum has been paid to me by Appellant.

Witness my hand and the seal of said District Court this 15 day of April, 1944.

(Seal)

EDMUND L. SMITH,  
Clerk,

By Theodore Hocke,  
Deputy Clerk.

In the District Court of the United States,  
for the Southern District of California,  
Central Division.

Hon. Harry A. Hollzer, Judge Presiding.

No. 1718-H-Civil.

AARON FERER & SONS,

Plaintiff,

**vs.**

RICHFIELD OIL CORPORATION, a corporation,  
Defendant.

REPORTER'S TRANSCRIPT.

of

TESTIMONY AND PROCEEDINGS ON TRIAL.

Appearances:

Carl B. Sturzenacker, Esq., and

Philip N. Krasne, Esq.,

For Plaintiff.

Robert E. Paradise, Esq.,

For Defendant.

Los Angeles, California, Thursday, September 3, 1942;  
10 A. M.

(Case called.)

Mr. Paradise: Ready.

Mr. Krasne: If the court please, as the court knows, Mr. Sturzenacker is of counsel for plaintiff. He was due in from Sacramento this morning at 7:00 o'clock but the train, as so many trains, unfortunately, are these days, has been delayed. He thought he would be in court by 10:00 o'clock.

The Court: Did you say he is in town?

Mr. Krasne: No. He will be here when the train arrives. I would like to ask the court's indulgence for a few minutes awaiting his arrival. I know that he planned to be here and I know he thought he had given himself sufficient leeway to be here by 10:00 o'clock.

The Court: Have you communicated with his office or his home to ascertain whether he has arrived?

Mr. Krasne: I spoke to his office about a half hour ago and, also, Mrs. Sturzenacker called the office and said that the train had not arrived and that he expected to come directly here instead of going to the office; that she just guessed, from keeping in touch with the station, that it would be 10:00 o'clock before the train arrived.

The Court: I have this suggestion to make. Suppose we take a recess until 10:30 and in the meantime you may communicate with the depot to find out when the train is [2\*] expected.

(Short recess.) [3]

Los Angeles, California, Thursday, September 3, 1942;  
10:40 A. M.

Present:

Philip N. Krasne, Esq.,

For Plaintiff.

Robert E. Paradise, Esq.,

For Defendant.

The Court: I believe we are ready to go forward with the trial of this case of Aaron Ferer & Sons vs. Richfield Oil Corporation and that we are permitting the defendant to call a witness out of order.

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\*Page numbering at foot of page of original certified Reporter's Transcript.

Mr. Krasne: May I say, for the purpose of the record, that, while the court has indicated and counsel, likewise, has indicated that he desires to call Mr. Montgomery out of order, it was my understanding that the matter that was to be presented for trial this morning was the matter of the reformation of the contract; that the other issues with respect to the contract had previously been determined. I recall, if I am not in error, that it was the understanding that Mr. Paradise, on behalf of the defendant, would proceed under his counterclaim or cross-complaint; so that, in truth and in fact, he is really not calling Mr. Montgomery out of order but is proceeding to prove, I presume, the allegations in the counterclaim in which it is alleged the contract should be reformed. All of the other issues with respect to the contract, it seems to me, have previously been disposed [4] of by stipulations. Certainly, we are not now, with the understanding that has been had here for some time, going into collateral attacks on the contract itself.

The Court: I think it would be helpful for an observation to be made. When we came to consider the respective motions for summary judgment, the record on which included affidavits and depositions, evidence was developed which I think presents another aspect to the case. I have in mind particularly that the record as it was presented in support of these motions for summary judgment discloses circumstances surrounding or attending the execution of the contract. And, while I do not wish to be understood as having reached a final conclusion in the matter, I must say that I am impressed with this situation, namely, that a question has been raised in my own mind respecting the proper construction of this contract in the light of the circumstances attending and leading up to its execution as disclosed by the pres-

ent record. And I feel that the question of what should be the final construction of the contract should not be considered as foreclosed. While, prior to the submission of these motions for summary judgment and upon a consideration of the complaint itself, we did express certain views as to the meaning of the contract, I feel that I ought to point out to counsel that I am not convinced as to the correctness of that ruling in the light of the circumstances leading up to and attending the execution of the contract as developed by the present record. [5]

Mr. Krasne: I would certainly like to say this to the court, your Honor, and to state my position. If in fact this case is to be tried on all issues *de novo*, so to speak, and the previous indications of the court are not to be treated as rulings, then I certainly am not prepared this morning to try this case. I think I have quite properly been justified in my own mind from the many times that we have been before your Honor in this matter and from the rulings that have been made by your Honor to have concluded that all we were going to try this morning was the question of whether or not this contract should be reformed, the question of interpretation having been passed upon. Of course, I recognize that it is definitely within your Honor's province to change that ruling. On the other hand, I stand here very definitely prejudiced if I were to proceed on this other theory because I have long since dismissed from my mind, and I think quite justifiably, the question of the interpretation of the contract and going back and trying all of the issues *de novo*. I think it is one thing for the plaintiff to respond to the defendant's claims of an oral agreement and reformation

of a written agreement to conform to that. I think the defense on that score is an entirely different one than to try to prove the case from the beginning.

The Court: Let me make this clear. If at the close of the case, and I mean at the close of the introduction of evidence, and after consulting with your client, you are [6] satisfied that there is additional evidence that you consider can be produced and which you would desire to present, that opportunity will be afforded.

Mr. Krasne: The difficulty is that my whole attitude in this case with respect to the depositions and with respect to the stipulation that your Honor asked me to enter into about using the depositions would have been entirely different if I had not justifiably felt that this court had already passed upon the interpretation of that written contract. In other words, I sat back and let counsel go on the widest kind of a fishing expedition because I have never felt in my own mind so far as the record would ultimately be developed that a case of reformation could be established or proven.

I am in the position, in view of your Honor's frank statement now, still having in mind the interpretation of the contract, that I think I am entitled to try this case in an orthodox manner from the very beginning because I say to your Honor, very candidly, I think that my client has been seriously prejudiced by permitting the matter to go on as it has, relying upon certain rulings that the court voluntarily made. In the first instance, I didn't ask the court for the ruling on the interpretation of the contract. The court voluntarily made it. And in all of the discussions we have had, and we have been before your Honor on numerous occasions and I have had numerous meetings with counsel, this is the first time when

I am told that that ruling may not be the [7] ruling of the court. I have proceeded with this case counting upon that. I certainly would want to be relieved of my stipulations with respect to the contents of the depositions because I felt that the issue in this case had been narrowed down to an issue that I haven't been worried about in so far as the record is concerned.

The Court: To what stipulations are you referring?

Mr. Krasne: Your Honor requested counsel to stipulate the last time we were here that all of the affidavits and all of the depositions might be treated as evidence, subject, of course, to the right of further cross-examination and objections and so on and so forth. I say to your Honor that my attitude with respect to those depositions themselves would have been completely different if I had thought we were not considering the one narrow issue of reformation of the contract. And, had the indication of the interpretation of the contract not been made, I never would have been so presumptuous as to have filed a motion for summary judgment in this case and permitted the wide fishing expedition on depositions that has been made to try to show cause for reformation. I think that I am entitled to have the matter tried in an orthodox manner with a straight, clean-cut, record and I think I don't have it. I think I will have a very bemuddled record if I proceed the way the case now stands; and I would far prefer, even though it is my keen desire to try this case and get it disposed of, to let the matter go [8] over to a date when we can be heard fully and completely in the presentation of our case. If it is a matter of the interpretation of the contract and the other elements that are apparently still in your Honor's mind, I say I want to try this case from scratch. I want to



try it with that in mind, having gone through months of effort and briefs and work that was directed to only one issue because of the indication that that was what the case had been narrowed down to. I know your Honor, if you were standing where I am standing, could appreciate my position.

The Court: I think we can proceed with the trial of the case on the pleadings as they now stand. And, in the event that I should conclude that the case is to be disposed of on some issue other than the issues raised by the defendant affirmatively, I can set the matter down for further hearing so as to allow your client to have the time to present further evidence.

Mr. Krasne: To have the record straight, and so that I understand it, I understand that we are before your Honor this morning, under arrangements previously made, to try solely and only the question of reformation of the contract as alleged and set forth in the counterclaim and cross-complaint; that that is what we were supposed to be here to try this morning solely and only.

Mr. Paradise: I don't understand it in that light, your Honor, that is to say, it is my understanding from the court's [9] minute order that was made as a result of our last conference before the court that the issue to be tried this morning was whether this contract covered the casing in the wells and the other issue was to be deferred so that, if the court should decide the contract did cover the casing under either the complaint itself or under the counterclaim for reformation, the issue as to the amount of damages would be deferred. It was my understanding that the case was to be tried on the merits and the issue of the interpretation of the contract, as your Honor has pointed out, was determined at the time

of the motion to dismiss on the face of the complaint alone, and that that ruling was made entirely without prejudice, as I understood the court's ruling, to any showing that would be made by the defendant. The same evidence which the defendant is offering as a part of the issue of reformation will also be offered on the plaintiff's original case, that is to say, the interpretation of the contract. And I was going to inquire of the court, under the court's minute order of July 1, 1942, whether the court's order that the affidavits and depositions are admitted into evidence, subject to the qualifications as to cross-examination and objections, is they are not admitted both for the issues between the complaint and the defendant's answer as well as the defendant's counterclaim and reply.

The Court: Let me have the file, Mr. Clerk.

Mr. Paradise: As I say, it is the same evidence. [10]

The Court: It will be observed that, under date of June 29, 1942, a minute order was entered. It is rather brief and I think we ought to read it. "It appearing that plaintiff has filed a motion for summary judgment, or if denied, for a bill of particulars, that since the filing of said motion various affidavits have been filed on behalf of defendant in opposition to said motion and that in addition thereto several depositions have been taken on behalf of defendant, also that defendant has filed a motion for summary judgment upon the two causes of action set forth by way of counterclaim or cross-complaint in its answer, and good cause appearing therefor, it is ordered that plaintiff's motion be and the same is denied. It is further ordered that the submission of defendant's motion for summary judgment is vacated."

Then, it appears that counsel were before the court on July 1, 1942. At that time, according to the minutes, the following took place, "This cause coming on exparte, Philip N. Krasne, Esq., appearing for the plaintiff, Robert E. Paradise, Esq., appearing for the defendant; the court and counsel discuss the minute order of June 29, 1942, and the court makes a suggestion regarding the coming trial of this cause.

"Pursuant to stipulation of counsel, it is ordered that this case be set for trial on the merits; that at the trial the affiants that signed various affidavits in connection [11] with the respective motions for summary judgment be deemed to have testified on direct examination on the matters stated in the affidavits, subject to cross-examination, provided that the affiants are produced for cross-examination; and, also, that the deponents, whose depositions have been taken, be deemed to have testified to the answers given on the taking of their respective depositions, subject likewise to cross-examination without restriction because of those same witnesses having been previously upon cross-examination, and it is further ordered that proper objections to questions in the depositions may be made at the trial.

"Attorney Krasne asks that the court make a ruling on defendant's motion for summary judgment which is now pending.

"The court states that, it appearing that issues of fact have been raised on defendant's motion for summary judgment, it is ordered, that upon that ground alone, said motion be and it is denied."

While I shall still allow further time for the presentation of evidence, such additional evidence as plaintiff may wish to offer, I think it may fairly be said that the issues which were raised in connection with plaintiff's motion for summary judgment still remain issues in the case. Otherwise, we would have granted the motion. The fact that we denied the motion would indicate that they are still to be tried.

Mr. Krasne: Except, if your Honor please, the motion for summary judgment was predicated upon the fact that the [12] court had already ruled concerning the interpretation of the contract. All proceedings since the date that the court had ruled upon the interpretation of the contract I would say, in so far as both sides of this case are concerned, were predicated upon the fact that the court had already interpreted the written contract.

The Court: I don't think you need to argue that point further because I have already indicated that, in view of **the fact that** you have labored under the belief that you were no longer concerned with the question of the proper construction of the contract, you would not be prejudiced so far as being afforded an opportunity of presenting such additional evidence as you think proper. But the fact still remains that when your motion for summary judgment was denied, in spite of the previous ruling respecting the construction of the contract, I think it may fairly be construed to indicate that issues of fact respecting the execution of that contract had been raised in connection with your motion for summary judgment which had to be tried. I think among those issues of fact was what were the circumstances leading up to and attending the execution of the contract. However, you

will not be foreclosed from presenting the evidence that you think you would otherwise have presented had you not considered that those issues were closed.

Mr. Krasne: I should like at this time, in view of the statements made by the court, to be relieved of the stipula- [13] tion that I have entered into whereby the depositions and affidavits on file in this case were to be treated as evidence. I state to the court that, had I been as enlightened then as I am now, I would have refused to enter into the stipulation. I believe that my client under the circumstances has been prejudiced by my having made that stipulation and I ask at this time to be relieved of the stipulation so that we can have a record developed properly and without being encumbered by many collateral things that found their way into those depositions and affidavits.

The Court: May I ask how you will be prejudiced if those stipulations remain?

Mr. Krasne: I will tell your Honor why and how. Number one, having in mind, properly or improperly, one narrow issue, I felt that nothing sufficient had been developed in the depositions. I knew they were costly and I didn't buy a copy of them and I haven't studied them as minutely as I would if I had had in mind that the court might use some of the evidence in there to aid in an interpretation of the contract and I would have made different objections. I just have not protected my record because I didn't count on that issue and I do think that we are prejudiced.

The Court: You say that you have not purchased a copy of the depositions. You still have the right of cross-examining those witnesses. I understand under the stipulation they were to be produced here. [14]

Mr. Krasne: I know but I am in this position. Having been more or less requested to enter into that stipulation and having had one thing in mind, and that there are probably scores of statements in those depositions that may have a bearing upon the issue that your Honor has alluded to this morning, I will be charged with carelessness so far as my client is concerned for having allowed things in the record that don't belong there. I haven't gone over these depositions with a fine-tooth comb to see what questions would be objectionable in the light of the attitude expressed by your Honor. In other words, I, unquestionably, have in this record today dozens and dozens of questions that are objectionable and I am not prepared to go through them now and to make the proper objections or to proceed on a theory that is wider than just the question of reformation. And I think it would be highly unfair. Your Honor knows as a practical matter, as your Honor has practiced law, that, when you get into a counsel's room and you take depositions, you have only one thought in mind, and you say, "O. K.; let them go ahead and get their story." I assure your Honor it would have been entirely different if there had been more issues than one to be determined at the time those depositions were taken. And I do say to your Honor, quite frankly, that I think we would be prejudiced and I would far rather let this case go over and try the case from the beginning, as if your Honor had never determined the contract matter, and start from scratch. [15] Then I feel I could present a case entirely different than I can now. And I am afraid we will be in a position, in any event, of not getting through now. Your Honor indicated, I believe, that there were two days available to us in this particular part of your calendar. Or am I in error?

The Court: That is correct.

Mr. Krasne: We have always considered there was to be just that one issue. I tell your Honor, frankly, I don't want to try the case in this limited period if there are still a lot of issues open. I would like very much to have the opportunity to try this case from scratch. The case is too important and I think I have handled it very badly for my client but I think with some degree of justification because of the manner in which we have proceeded.

The Court: Don't you think, Mr. Krasne, that, if during the course of the proceedings, such as the taking of depositions, facts are developed which throw light on either the construction of the contract or the determination of any other issue in the case, we are all expected to take note of such evidence?

Mr. Krasne: Yes; I think so if I understand your Honor.

The Court: Whatever the legal effect of that evidence may be, I think we are all expected to give heed thereto.

Mr. Krasne: The only difficulty that arises is I recall distinctly urging your Honor to make a different order with respect to the defendant's motion for summary judgment than [16] you had originally made. In other words, I explained to your Honor, whether it was because of my stupidity or not, I didn't know what your Honor meant or what the effect was of ordering the submission of the motion vacated. I felt, if we were talking about going to trial on the merits, your Honor

should make a ruling; and then again your Honor left me guessing. I tried to almost plead with your Honor, discreetly, to have your Honor let me know what you had in mind because we were trying to get ourselves ready for trial, and you finally made an order that I still didn't understand the significance of. Apparently, the thing that was in your Honor's mind then was that which you have expressed this morning. And, if your Honor had expressed yourself that way on that occasion, I assure you, because I would have felt I owed it to my client, I would not have responded to the request to stipulate with respect to these depositions. I just wouldn't have done it. There was no need for it. The witnesses are here and the people are here and I would rather have them testify before your Honor. That is the position I find myself in. I think no great harm could be done. It might take another few days of trial and we might have to wait for a time when it would be available. But I think, in the interests of justice, that is the fair thing to be done and that is my request to the court. And I think that I should be relieved of the stipulation that was entered into based upon what I feel was a misunderstanding at the time it [17] was entered into.

Mr. Paradise: If I may say a word, your Honor, I think that perhaps Mr. Krasne has exaggerated the difficulties he finds himself in, that is to say, the plaintiff's motion for summary judgment was made after the answer was on file. The motion to dismiss was made at a time before the defendant had filed any answer and



the court's ruling was made on that motion and the court made an interpretation of the contract based upon the bare record, which said that it was without prejudice to answer. Then the defendant filed its answer denying all of the allegations of the complaint and also setting up two causes of action for a counterclaim. It was at that time that the plaintiff chose to make its motion for a summary judgment, which was not solely directed against the counterclaim for reformation but was also directed to the entire answer which denied the allegations of the complaint. It was at that time that the depositions were taken and I assure the court that the same questions which Mr. Krasne said that he did not object to at the time of the taking of the depositions would have been asked and sought into at the time of those depositions, even though there had been no question of reformation of the contract.

It is the position of the defendant, if the court please, that the contract has an ambiguity in it, either apparent on the face of the contract or an extrinsic ambiguity, and that all of the evidence that has been elicited in the depositions [18] is admissible under the parol evidence rule both as to the cause of action as stated in the complaint and as denied in the answer and also as to the issues raised on the counterclaim. The court's minute order of July 1 states that the depositions have been admitted into evidence subject to proper objections to questions and, of course, that is in line with the rule of court that at the time of the taking of depositions no objections

need be made to inadmissible evidence, that is to say, the objections could be made in court. And the only objection that counsel could have in mind, when he says that he didn't object at the time of the depositions, is an objection to admissibility under the parol evidence rule. I assure the court that the questions and answers would have been the same. So I can't, if the court please, see the difficulty that the plaintiff finds itself in or any prejudice that has occurred to the plaintiff.

The Court: I am not disposed to make any ruling that will appear to be arbitrary. It occurs to me that, since there is not likely to be any time available to try this case until next January, a continuance to that time should, nevertheless, leave the stipulations as they now stand. A continuance for such a lapse of time would, obviously, allow the plaintiff more than a reasonable period of time within which to examine the depositions that are on file here, and, of course, you have copies of the affidavits, and to prepare to present such objections as the plaintiff may think proper, [19] and, also, to prepare to cross-examine fully. I think that it could very easily result in prejudice if the order made on July 1 were modified and still delay the trial for some four months. In other words, the plaintiff will have then more than ample time within which to present evidence and prepare for the cross-examination of the witnesses whose affidavits and depositions have been received as evidence in chief and, likewise, more than ample time within which to present objections to the evidence thus given in chief. As a matter of fact, I would think that the plaintiff at

least has already had the benefit, if not the advantage, of knowing the contentions which the other side is making as to the legal effect of the evidence offered in support of the defendant's motion for summary judgment and in opposition to the plaintiff's motion for summary judgment. So I think that, to remove any doubt in the matter as to whether or not the plaintiff has been misled and thereby failed to make due and adequate preparation for trial, the proper thing would be to leave the order of July 1 and the stipulations referred to therein stand and fix another trial date.

Mr. Krasne: I know I have spent too much time already on this and I don't want to appear to be argumentative but I don't see why, if we are going to try this case, it would do any harm for me to have the opportunity of having questions propounded and objections made when they are propounded and have a regular orthodox record in this case. I don't [20] think that enough is to be gained on the point of whatever little time might be saved by using the affidavits and depositions as evidence to justify even making me worry that those depositions should not be in there because I make the positive statement to your Honor that I just never would have entered into that stipulation had your Honor said the same thing on that occasion as you have said this morning. I don't know why the other side would be prejudiced. They have these depositions attacking the credibility of witnesses but I don't know why I should not have the opportunity of just having a straight orthodox record in this case, questions being asked and objections being made and then the questions answered.

I don't know if your Honor appreciates the task that is now put upon my shoulders of going back through those depositions and trying to analyze that thing tech-

nically and coming in here with one wholesale list of objections at the time of trial and, in order to get a record, read the questions and make the objections to protect my record. I think that it doesn't do the court enough good in the interests of time or counsel enough good to saddle me with that burden and that unorthodox method of trying this case. I just plead with your Honor to relieve me of the stipulation, that was made under a misunderstanding, that I don't think we should be charged with.

The Court: Am I correct in understanding that Mr. T. H. [21] Clements has some interest in this lawsuit?

Mr. Krasne: Yes; he has.

The Court: So far as the depositions of Mr. Clements and Mr. Morris Ferer are concerned, I see no reason why any complaint should be made about leaving the record as it is, subject to the right of interposing such objections or asking such further questions as you think proper, because they are clearly parties in interest; and, if they have anything additional to testify to, the opportunity will be afforded. I don't think that parties to a lawsuit may properly complain about having their depositions made a part of the record in the case.

Mr. Krasne: No; I don't think that is as objectionable as the other. Of course, I think, in connection with the use of depositions bodily in a record, there should ordinarily be some reason for doing it that way.

The Court: I notice that there is also a further deposition, that of Mr. David Zeidenfeld. Is Mr. Zeidenfeld in the courtroom? If so, will you stand up? What is your age?

Mr. Zeidenfeld: 33.

The Court: Are you single or married?

Mr. Zeidenfeld: Married.

The Court: Are there any children?

Mr. Zeidenfeld: Yes, sir.

The Court: Of course, there is the contingency that, by delaying the trial, Mr. Zeidenfeld may, through the fortunes [22] of war, which we hope not, be unavailable here.

Mr. Krasne: That is quite true and I think under any such circumstances depositions would be useful. But here is an array of men who signed the affidavits and they are all available and here is a man in the courtroom who will probably be available. I just want to put them on the stand.

The Court: I want to avoid, in any event, this sort of a situation. We have all had, of course, sufficient experience to realize that there is nothing more uncertain than life itself and I don't want to be confronted with an application for any further postponement, when the case is called next January, because of those very contingencies that all of us recognize may intervene between now and the time of trial. I am inclined to think that I ought to at least indicate that I will reconsider the question as to these other parties who will be expected to be here, and I am inclined to think when they are here that we can then more readily and more safely vacate that portion of the order of July 1 which involves the affidavits of those persons. I don't want the case left in such shape that, because of some unforeseen and

unpredictable contingency that might arise during the intervening period, the record will be virtually a blank. I am inclined to be sympathetic to your motion as to all of the other deponents and affiants but I don't want to make such a ruling now since we do not know how many of these people will be here. [23]

Mr. Krasne: Do I understand your Honor to mean that when we come here for trial I am to find out then whether or not I have in the record these affidavits and depositions or can't we decide that now? I wouldn't know how to prepare under those circumstances. In other words, why shouldn't the shoe be put on the other foot? Why shouldn't I be relieved of my stipulation now if it appears at the time this matter is set for trial that any of the witnesses who have signed affidavits or whose depositions have been taken are not available? Then why wouldn't it be a proper thing for Mr. Paradise to come in and present those circumstances and say, "Therefore, why shouldn't I be entitled to use those affidavits and depositions?"

The Court: Because you are now free to cross-examine those persons and they are now in the courtroom. In fact, I am willing to go to this extent, that, assuming that those affiants can be here at that time, I will vacate the order to the limited extent of requiring their evidence to be given in chief on the stand.

Mr. Krasne: If they can be in court—

The Court: In other words, if they remain away through their own fault or the fault of the defendant, I would consider that they would not be entitled to the benefit of the existing order.

Mr. Paradise: I can tell the court right now that Mr. Davis in all likelihood will not be available. Mr. Davis is [24] one of those who has filed an affidavit. Mr. Davis received notice of the fact this morning that he has been put in Class 1-A of the draft and he will in all probability not be available. But Mr. Davis, in response to the court's order, is present in court this morning.

The Court: Which is Mr. Davis?

Mr. Paradise: Mr. Davis, will you stand up?

The Court: What is your age, Mr. Davis?

Mr. Davis: 37.

The Court: Are you single or married?

Mr. Davis: Single.

The Court: Hadn't you better determine say to cross-examine Mr. Davis either this afternoon or tomorrow morning?

Mr. Krasne: I would appreciate that under the circumstances very much. I would like to do that.

The Court: You might do this. You might cross-examine Mr. Davis this afternoon. And I have this further suggestion to make. I would be disposed to have you borrow either the original deposition of Mr. Zeidenfeld or, if counsel has no objection, you may use his copy.

Mr. Krasne: Mr. Paradise has already loaned it to me, your Honor, on occasions when I have requested it.

The Court: Yes. So that you might cross-examine Mr. Zeidenfeld in the morning, so that at least to that extent—

Mr. Krasne: With respect to Mr. Zeidenfeld, here is the situation where he is now available and I think that there [25] would be no reason why the stipu-

lation with respect to his deposition should not be vacated and put Mr. Zeidenfeld on the stand and ask him all of the questions and get his answers. I don't think it would take any longer. We would almost have to do it from the beginning. If your Honor has read that deposition, you will know what I mean.

The Court: I am inclined to even think that that might be done, in other words, that Mr. Zeidenfeld might be interrogated in chief and cross-examined tomorrow and simply reserve this afternoon for your cross-examination of Mr. Davis.

Mr. Paradise: Does the court desire to hear the evidence of Mr. Montgomery at this time? Mr. Montgomery's testimony will tend largely both to the question of reformation as well as to the interpretation of the contract and the surrounding circumstances, that is to say, the intention of the defendant. I suggest that solely for this reason. The court's order pertains to those who have made affidavits and those whose depositions have been taken, and that, if they are not available at the time of trial—that is to say, that there will be evidence provided they are available at the time of trial. I don't know whether Mr. Montgomery will be subject to the draft or not but at least he is available at this time. And, if the court should postpone the case until sometime in January, he may not be available. Does the court wish to hear Mr. Montgomery's testimony at this time? [26]

The Court: Let me inquire. Mr. Montgomery, would you mind telling us your age?



Mr. Montgomery: 51.

The Court: I don't think there is any real danger of

Mr. Montgomery being called into the service. I think, if there is time available say tomorrow afternoon, then, if you wish to put Mr. Montgomery on, you might do that, but I think we ought to dispose of, first, the cross-examination of Mr. Davis, which will be this afternoon, and then devote tomorrow morning to the direct and cross-examination of the witness Zeidenfeld.

Mr. Paradise: Mr. Davis' affidavit I think is some three or four pages in length. I don't know how long Mr. Krasne's cross-examination might take but, in the interests of expediency, if we have further time this afternoon, could the testimony of Mr. Zeidenfeld continue right on or would you prefer tomorrow morning?

Mr. Krasne: It is entirely possible we will finish with Mr. Davis before the afternoon is over, isn't it, and we can start with Mr. Zeidenfeld?

The Court: Very well; we will do that. We will ask Mr. Davis and Mr. Zeidenfeld to return at 2:00 o'clock this afternoon, and Mr. Montgomery can be excused until tomorrow. Do you think that we will conclude with the testimony of both Mr. Davis and Mr. Zeidenfeld this afternoon?

Mr. Krasne: I hardly think so, although there is a [27] possibility of it.

The Court: Would it make any difference whether Mr. Montgomery held himself available for tomorrow morning?

Mr. Paradise: That will be satisfactory.

The Court: Very well; the matter of the trial will go over until 2:00 o'clock this afternoon. [28]

AFTERNOON SESSION  
2:00 O'CLOCK

Present:

Carl B. Sturzenacker, Esq., and  
Philip N. Krasne, Esq.,  
For the Plaintiff.

Robert E. Paradise, Esq.,  
For the Defendant.

Mr. Paradise: Mr. Davis is available for cross-examination, your Honor, under the court's minute order.

The Court: Very well. Come forward and be sworn, Mr. Davis.

HAROLD E. DAVIS,

a witness for the defendant, being first duly sworn, testified as follows:

Q. By the Clerk: What is your full name?

A. Harold E. Davis.

Cross-Examination

Mr. Sturzenacker: May it please the court, I apologize for not being here this morning but, unfortunately, the Southern Pacific is a little bit late these days and they are going to be later probably as time goes on. [29]

If your Honor please, before starting the cross-examination, which will be based upon the affidavit, that is, cross-examination as to the statements made in the affidavit, we wish to move to strike certain portions of the affidavit of Mr. Davis heretofore filed. Beginning on line 25 of page 1, "That, on or about the month of August, 1940, he notified Mr. McGahan, the storehouse su-

(Testimony of Harold E. Davis.)

pervisor of Richfield Oil Corporation, that the management had decided to sell certain of the surface equipment at Casmalia and requested Mr. McGahan to notify prospective bidders that such surface equipment, with certain exceptions, would be made available for sale," I wish to strike that.

The Court: I don't think it is of any consequence. It sounds like an introductory statement. I think it must be perfectly obvious, when a corporation undertakes to sell some of its assets, that one or more of its employees have done something of this kind. So that may go out.

Mr. Sturzenacker: Then, beginning on line 31, "That shortly thereafter affiant asked Mr. R. D. Montgomery, head of the Exploitation Department of Richfield Oil Corporation, which, if any, of the surface equipment at Casmalia Mr. Montgomery desired to have left remain on the property. Mr. Montgomery informed affiant that he wanted to have the large storage tanks remain on the property in case the management should determine to open up for production any of the wells on the land." That is on the same grounds and, further, [30] that it is hearsay.

The Court: It is really hearsay. I don't think it makes a particle of difference in the outcome of the case what these gentlemen said amongst themselves. That is ordered stricken out.

Mr. Sturzenacker: Now, on page 2, line 24, beginning with the words "That the meeting had been called for the purpose of discussing the terms of the proposed contract between Richfield and Aaron Ferer & Sons," on the ground that that is a conclusion.

(Testimony of Harold E. Davis.)

The Court: I am inclined to think that that is about all that can be said of that statement. Do you see anything there, Mr. Paradise, that is material and essential?

Mr. Paradise: It was only to bring out the fact, if the court please, that the contract or the negotiations for the contract were still in their preliminary stage.

The Court: Doesn't that appear from other evidence, both the depositions of Mr. Morris Ferer and Mr. Clements?

Mr. Paradise: I think that is quite right, your Honor. And, when I said preliminary, I didn't mean preliminary in the sense of what had gone before that was unimportant but that the negotiations had not prior to that time been completed.

The Court: That may be stricken out.

Mr. Sturzenacker: And, on page 3, line 26, beginning with the word "That" after the words "metal and lumber"; [31] "That affiant did not intend that there be included in the sale the casing in any of the wells on the property." I move that that be stricken as strictly a conclusion of the witness or the person making the affidavit, who is now a witness.

Mr. Paradise: I object to the striking of that. That is the ultimate fact.

Mr. Sturzenacker: That is what the court is going to have to decide in this matter and not what the witness can testify to. It is a legal conclusion.

Mr. Paradise: If the court please, if Mr. Sturzenacker's theory is that the witness can't testify as to what his intentions were, then, obviously, the matters

(Testimony of Harold E. Davis.)

that Mr. Sturzenacker has requested be stricken, such as his conversations with the department heads of Richfield, which prove his intentions by what he said at that time, must, nevertheless, remain in. In other words, intention must be proved in one of two ways and, if one of them is a conclusion, then the other is proper evidence.

The Court: My present view is that what the parties did by way of action, that is to say, their acts, their conduct and the words exchanged between them, constitutes the basis upon which the intent should be drawn. Of course, it is true that in a criminal case a man is permitted in his own defense to assert what he did or did not intend to do which has evidentiary value. I must say that, in studying the case, I found nothing of value in that statement. In other [32] words, I couldn't bring myself to give it any weight because the man stated that he didn't intend to do a certain thing. I shall strike it out.

Mr. Sturzenacker: On page 4, the last paragraph, beginning with line 10, I think that perhaps the observation would be the same as to this particular statement. It is more of a negative statement. "That at none of the meetings or conversations with either Mr. Ferer or Mr. Clements was there any mention whatsoever of the casing in any of the oil wells on the property or of the abandonment by Aaron Ferer & Sons of any of the oil wells on the property."

The Court: I can't follow you there. I think a witness is permitted to testify as to what did transpire and as to whether a certain thing did not take place at a meeting.

(Testimony of Harold E. Davis.)

Mr. Sturzenacker: I think you are right on that, your Honor. The only grounds for striking that would be that it is surplusage probably. That is all of that.

Q. By Mr. Sturzenacker: Mr. Davis, your exact title with the Richfield Oil Corporation is what?

A. Buyer.

Q. What?                      A. Buyer.

Q. In the purchasing department?

A. That is right.

Q. And who is in charge of that department?

A. Mr. H. H. Kelly. [33]

Q. And you are his assistant?

A. I am one of the buyers.

Q. You are one of the buyers?                      A. Yes, sir.

Q. And as part of your duties you state that you have something to do with the sale or the preliminary negotiations for the sale of salvage and worn out equipment?                      A. That is right.

Q. You are familiar, of course, with this equipment that is in issue here at Casmalia?                      A. Yes, sir.

Q. Did you ever see it?                      Yes, sir.

Q. When was the first time you were on the ground? Do you recall?

A. In September of 1941, or I mean 1940.

Q. 1940?                      A. Yes, sir.

Q. May I ask how long have you been with Richfield?                      A. Since 1927.

Q. And during the time that you have been with Richfield has at all times the Richfield Company owned the property at Casmalia?

A. Either Richfield or their predecessors.

(Testimony of Harold E. Davis.)

Q. Do you have any idea when Richfield did acquire it?

A. I believe it was sometime in 1928 or along about [34] that time.

Q. And they acquired it from the Pan American Oil Company? A. Yes, sir.

Q. Do you have any knowledge, Mr. Davis, as to whether or not this equipment, either the wells or the refining equipment, was ever operated by Richfield?

A. I can't answer. I don't know.

Q. Do you mean by that you don't know whether they were or were not?

A. I don't know whether they were operated by Richfield or were not operated by Richfield.

Q. Were you ever informed by anybody—I will withdraw that question. Did you ever do any buying or furnish any supplies for either the producing or refining units at Casmalia?

A. A lot of our material is bought and put in warehouse stocks and the ultimate use of it, of course, we don't know exactly.

Q. You wouldn't know whether or not it went to this particular unit or not? A. Not necessarily.

Q. You have no recollection of ever buying any equipment that was delivered directly to that location, have you?

A. Only since the property has been idle.

Q. Do you mean since Mr. Ferer had this contract and [35] started to work cleaning up the place? Is that it?

A. Well, I think probably sometime within the last three or four years we have sent a nipple or an ell or some other fitting up there to be installed.

(Testimony of Harold E. Davis.)

Q. Do you have any knowledge of whether or not the wells have been operated or the producing unit has been operated at all since Richfield has had possession of it?

A. No, sir.

The Court: Is there any controversy about that?

Mr. Paradise: No; there is no controversy about that. I will stipulate that the wells haven't been operated since October, 1925.

Mr. Sturzenacker: We will accept that stipulation.

Mr. Paradise: It is either 1925 or 1926. I am not sure which date it is.

Mr. Sturzenacker: Anyway, prior to the time Richfield acquired it?

Mr. Paradise: That is right.

Mr. Sturzenacker: And is that true also of the refining equipment, Mr. Paradise?

Mr. Paradise: I don't know, Mr. Sturzenacker. I think that is true. And, to clear up one further point so the record will be clear, the Casmalia property, I think, belonged to the Pan American Petroleum Company, the stock of which was acquired by Richfield Oil Company of California in 1929. [36]

Mr. Sturzenacker: Thank you.

Mr. Paradise: And the Richfield Oil Corporation acquired Pan American's properties in March of 1937 in connection with the reorganization under 77B of the Bankruptcy Act of Richfield Oil Company of California, which were proceedings in this District.

The Court: May I interrupt to ask the reporter to read from your notes the stipulation previously offered by Mr. Paradise?

(Record read by reporter.)



(Testimony of Harold E. Davis.)

Mr. Paradise: I might add just one more statement, your Honor. When I said had not been operated, I meant had not been operated for the production of oil from the wells.

Mr. Sturzenacker: That is satisfactory and thank you, Mr. Paradise.

Q. Now, Mr. Davis, prior to the time that—I will withdraw that question. When was the first time that you ever in your duties heard anything about selling any of the equipment on the Casmalia lease?

A. That is pretty hard to answer because it has been discussed over quite a number of years.

Q. Well, may I ask this, then, for the purpose of brevity? From whom do you receive your instructions to conduct negotiations for the sale of salvage?

A. Mr. Kelly.

Q. And when was the first time that you recall receiving [37] any instructions from Mr. Kelly to sell any salvage on the Casmalia lease?

A. Are you referring to this particular salvage in this case here?

Q. No; any salvage.

The Court: On this property?

Mr. Sturzenacker: On this property.

A. Well, that may go back—or I can't answer that question exactly.

Q. In your affidavit you state that, sometime in August, 1940, you notified Mr. McGahan, the storehouse supervisor of Richfield Oil Corporation, that the management had decided to sell certain salvage equipment at Casmalia. Do you recall that instance?

A. Yes, sir.

(Testimony of Harold E. Davis.)

Q. Prior to that time, had you been instructed at any time to sell any of the equipment or salvage up there?

A. I believe we had disposed of some of that a year or so—well, we had discussed selling it sometime before then. However, that is not in conjunction with this particular sale.

Q. Did you, yourself, sell it?

A. I conducted the preliminary negotiations for selling it.

Q. And do you know who completed the negotiations?

A. They were finally completed by Mr. Kelly.

Q. Who? [38]                      A. Mr. Kelly.

Q. By Mr. Kelly?                      A. That is right.

Q. With whom were those negotiations started?

Mr. Paradise: I am afraid I don't understand the question. As to what sale?

Mr. Sturzenacker: As to this sale that was finally completed with Mr. Kelly about a year previous to the Ferer contract.

Mr. Paradise: Do you mean for other equipment?

Mr. Sturzenacker: Yes.

A. With whom were negotiations started? Is that the question?

Q. Yes. Do you remember?

A. Some members of the production department but I don't know their names without reviewing the files.

Q. You didn't negotiate with anybody who was a prospective purchaser, did you?                      A. Yes.

Q. Who did you negotiate with? Do you know?

A. Mr. Anderson, a fellow by the name of Anderson.

Q. Mr. Anderson of Santa Maria?

A. That is right.

(Testimony of Harold E. Davis.)

Q. And Mr. Anderson finally bought some of the equipment there, didn't he? A. Yes; he did. [39]

Q. Do you know what equipment he purchased?

A. He purchased some of the tubing, sucker rods and pumps and some other obsolete equipment which we had in the wells and on top of the ground.

Q. That was equipment from the producing unit, was it? A. That is right.

Q. He didn't purchase any refining equipment?

A. Not to my knowledge.

Q. You say that was sucker rods and tubing. And by that you mean the production string, do you?

A. No. That is the tubing.

Q. Just the tubing? A. Yes.

Q. And you say some of the engines?

A. There was some equipment located on the surface. I don't recall what it was now.

Q. You hadn't been up there at the time?

A. That was prior to the time I made a trip up there.

Q. You were not familiar with what was there?

A. Yes; I was fairly familiar with what was there through correspondence that we had and inventories that were available.

Q. Did you have an inventory of those products?

A. We had an inventory.

Q. Do you know how many tons that inventory ran?

A. No; I don't. [40]

Q. Do you recall the price that Mr. Anderson paid for that? A. No, sir.

The Court: May I interrupt to ask what period this is to which you are now referring? Approximately when did the Anderson deal take place?

(Testimony of Harold E. Davis.)

A. I would say that the Anderson deal started sometime in the early part of 1940.

Q. By Mr. Sturzenacker: At that time did your inventory disclose that there were tubings and sucker rods in the various wells?

A. The information I had indicated that.

Q. I didn't get that answer.

A. I said the information I had indicated that; yes.

Q. And you sold Mr. Anderson all of the tubing and the sucker rods out of all of the wells?

A. All that he was able to recover.

Q. Did your information disclose to you that some of the wells on the property had been closed off and the casings pulled out?      A. No.

Q. Were there any derricks on the wells that you know of?      A. Yes, sir; there were.

Q. And what happened to those under the Anderson deal?

A. They were dismantled and burned. [41]

Q. All of them?

A. That was supposed to be the deal. All that were remaining were dismantled and burned.

The Court: May I ask the reporter to read the two preceding questions and answers?

(Record read by reporter.)

The Court: Do I understand your testimony to be that the transaction with this man Anderson of Santa Maria included selling to him all the sucker rods and tubing which could be recovered, together with some surface equipment, and that all the derricks were to be dismantled and burned?

(Testimony of Harold E. Davis.)

A. That is right; yes, sir. May I add the surface equipment in the immediate vicinity of the wells?

Q. By Mr. Sturzenacker: By that you mean the walking beam or the engines or anything else that might have been used in the producing of oil from those particular wells, is that right?

A. Whatever happened to be right there that was no longer of any value to us.

Q. Did your inventory indicate to you what kind of tubing or sucker rods were in these wells? A. Yes.

Q. And you buy tubing and sucker rods quite often for your company, don't you? Is that right?

A. Yes; I do.

Q. And was there anything about the sucker rods or [42] tubing that rendered them obsolete?

A. I don't remember.

Q. Had you been producing these wells at that time, this tubing and the sucker rods would have been used for production in those wells, wouldn't they?

A. That is more of an operating problem which we in the purchasing department are not familiar with.

Q. It is a little out of your realm, in other words?

A. Yes, sir.

Q. So far as you know, however, there was nothing about the tubing or the sucker rods that made them obsolete?

A. Only an indication that, if they were good, they wouldn't be selling them.

Q. That is, you would be using them somewhere else, is that it?

A. That would be our assumption.

(Testimony of Harold E. Davis.)

Q. I notice in your statement you state you sold him all of the tubes and rods that he could recover. Was there any reason that he couldn't recover all of the tubes and all of the rods from all of the wells?

A. It is possible that some of them might have been stuck and it would have cost him more to have pulled them or have fished for them than they would have been worth if they had been recovered.

Q. And you didn't require him to go after those that he couldn't pull out easily? [43] A. No.

Q. Do you know when he started to work on those wells and when he completed his work?

A. I would say it was sometime in the spring of 1940 that he started and that he finished sometime in the summer or late summer.

Q. And you are having in mind, of course, that you started negotiations on this sale of the remaining equipment on the premises to Mr. Ferer sometime in August, 1940? Having that in mind, would you say that he had finished before you started negotiations on the sale of this equipment or not?

A. Would you mind repeating that question?

Mr. Sturzenacker: I will withdraw the question.

Q. As to this equipment that Mr. Ferer bought, you stated in your affidavit that you started negotiations or notified Mr. McGahan about August, 1940. Now, at that time you notified Mr. McGahan you were going to sell this equipment which Mr. Ferer afterwards purchased on the Camalia lease, had Mr. Anderson finished his work of pulling the rods and tubes?

A. I don't know without checking the records.

(Testimony of Harold E. Davis.)

Q. Do you have in your possession at the office, Mr. Davis, an inventory of the equipment that you sold to Mr. Anderson and the price? A. Yes; we have.  
[44]

Q. Did you make that deal yourself or did Mr. McGahan make it?

A. I don't think Mr. McGahan had anything to do with the deal.

Mr. Paradise: Would you like to see the contract covering that negotiation?

Mr. Sturzenacker: I would; yes.

Mr. Paradise: I will produce it later.

Mr. Sturzenacker: Thank you.

Mr. Paradise: On that basis, if the court please, that the contract is to be produced in court, I would like to move to strike the witness' answers with respect to the contract and the work which Mr. Anderson was to do under the contract as not being the best evidence and the contract will speak for itself.

Mr. Sturzenacker: That is satisfactory.

The Court: Yes. When the contract is produced, I think the motion should be granted.

Q. By Mr. Sturzenacker: Did Mr. Anderson do all of the work on the property that he was supposed to do under the contract?

A. He did to my knowledge.

Q. So far as you know, he did? A. Yes.

Q. On or about August, you stated that you notified McGahan that you were going to sell certain property at [45] Casmalia. Did you notify Mr. McGahan that there were any derricks still on the property?

(Testimony of Harold E. Davis.)

A. They were supposed to have all been burned in the early part of the summer of that year.

Q. You were up there in September of 1940?

A. Yes, sir.

Q. Were the derricks still up? A. No, sir.

Q. Were any of the derricks still up?

A. I didn't see any.

Q. Did you go all over the property?

A. No, sir.

Q. What portion of the property did you go over? Do you remember, Mr. Davis?

A. A portion around the refinery and the tanks that were to be retained and the dehydrator plant and where the superintendent's house is and a few of the wells in that particular area.

Q. Wells that were close to those particular units you have mentioned? A. Yes, sir.

Q. Did you go up the ravine where the wells are in the upper end of the property?

A. No; we didn't go up there that day.

Q. Do you know Mr. T. H. Clements?

A. I have met him; yes, sir. [46]

Q. You have known him for some time, haven't you?

A. He has been in my office three or four times, I guess.

Q. And when was the first time you met him? Do you recall?

A. I believe the first time I had seen Mr. Clements was when he came in my office with Mr. Ferer in the early part of 1941.



(Testimony of Harold E. Davis.)

Q. You had never met him before?

A. I don't think so.

Q. Do you remember meeting him in September of 1938, at which time he asked you if the Casmalia plant and refinery was going to be for sale shortly?

A. I don't remember that.

Q. And did you have any dealings with him between 1938 and the time he came in the office with Mr. Ferer?

A. That is possible.

Q. Do you remember selling him any refining equipment from Signal Hill?

A. Under the name of Clements?

Q. Either Mr. Clements personally or under his trade name of Refinery Equipment Company.

A. We might have but I don't know what it was or when, though.

Q. Do you remember selling him some refinery equipment that you had at Santa Fe Springs? [47]

A. I don't remember of it.

Q. Do you remember having some refinery equipment that you sold about that time or prior to the Ferer deal to somebody at Santa Fe?

A. Yes; we sold some equipment to somebody but it wasn't Clements as I remember.

Q. You don't recall who you sold it to?

A. It seems to me like it was a person by the name of Colin.

Q. Did you sell it all to him?

A. Well, I can't remember that. I would have to go back to the records.

(Testimony of Harold E. Davis.)

Q. And you did have some refinery equipment at Signal Hill?

The Court: Do you mean that was sold?

Mr. Sturzenacker: That was sold prior to the Ferer deal.

A. You are asking a very difficult question because we are continually selling material, naturally.

Q. I appreciate that. Did you ever hear Mr. Clements' name mentioned in connection with Mr. Colin?

A. No; but it is possible that he could have been involved in that deal.

Q. You have no recollection, along about October or November or December, of talking to Mr. Clements in your office in the Richfield Building relative to the sale of this Casmalia equipment? [48]

A. What year was that?

Q. 1940.            A. In December of 1940?

Q. October, November or December.

A. In my office?

Q. In your office.

A. With Mr. Ferer, did you say?

Q. No; with Mr. Clements. To refresh your recollection, you stated in your affidavit that, on the 8th day of January, 1941, a meeting was held in your office, at which time Mr. Ferer and Mr. Clements were present. Now, I want to ask you and I am trying to find out whether you recall at this time of ever talking to Clements, prior to the 8th day of January, 1941, about the sale of the property at Casmalia.

A. No; I don't remember talking to him in my office. I have talked to him over the telephone.

Q. Do you remember talking to him over the telephone?            A. Yes.

(Testimony of Harold E. Davis.)

Q. And about when was that conversation?

A. I didn't make a note of it and I have no idea when it was. It may have been probably in the fall of 1940.

Q. And what was said at that time about the Casmalia deal?

A. It was generally discussed but I can't recall what we talked about or what our discussions covered.

Q. Was anything said about Mr. Clements going up and [49] looking at the property?

A. Not that I know of.

Q. The first time you recall talking to Mr. Clements in your office, then, was with Mr. Ferer on the 8th day of January? A. Yes, sir.

Q. And that was the time Mr. Ferer paid the \$22,000 for the property, is that right?

A. That is right.

Q. Mr. Davis, prior to the time that Mr. Clements and Mr. Ferer came to your office on the 8th day of January, you were familiar with an offer that Aaron Ferer & Sons had made to purchase the Casmalia equipment?

A. Yes, sir.

Mr. Sturzenacker: Have you the original of that, Mr. Paradise?

Mr. Paradise: Is that in the notice to produce?

Mr. Sturzenacker: Yes. It is dated December 10th.

The Court: Shall we mark it either for identification or as an exhibit in evidence?

Mr. Sturzenacker: We would like to offer it as an exhibit, your Honor.

Mr. Paradise: I believe it is already in evidence as an exhibit to Mr. Ferer's deposition, is it not?

(Testimony of Harold E. Davis.)

Mr. Krasne: I think it was only marked for identification.

Mr. Sturzenacker: I have the copy and it was marked [50] for identification.

Mr. Paradise: The reporter's notes show that it was offered for identification and then admitted in evidence. It has been offered in evidence as Exhibit 2 in Mr. Ferer's deposition.

Mr. Sturzenacker: It is attached to the deposition, is it?

Mr. Paradise: Yes.

Mr. Krasne: Only a copy was offered at that time. Are you willing to stipulate that the copy, not being the best evidence, may, nevertheless, be admitted in evidence without objection because under our broad stipulation you would have the right to object to anything in the deposition if there was a ground.

Mr. Paradise: Oh, yes; I am satisfied with the letter. I just wanted to point out it appears in both places because it already has been offered.

The Court: We can mark it as both the plaintiff's exhibit and as a defendant's exhibit, then, and it may become Plaintiff's Exhibit No. 1.

Mr. Sturzenacker: I really didn't know it was introduced in evidence. If it was, I was wondering what I was doing with it in my file.

Mr. Paradise: Plaintiff's Exhibit No. 1, then, is the same thing as Plaintiff's Exhibit No. 2 in the deposition?

The Court: To avoid confusion, let's preserve the number [51] that it has and it will become Plaintiff's No. 2 in evidence.

Mr. Sturzenacker: O. K.

[PLAINTIFF'S EXHIBIT No. 2]

[Emblem]

Scrap Iron  
and Metals

All Types  
Waste Materials

AARON FERER & SONS

(Established Since 1895)

5585 East 61st Street

(At Slauson and Eastern Avenue)

Los Angeles, California

Telephone ANgelus 1-6141

December 10, 1940

Richfield Oil Corporation  
555 South Flower Street  
Los Angeles, California

Attention: Mr. H. E. Davis, Purchasing Department  
Gentlemen:

We are pleased to submit our bid in the sum of Twenty-Two Thousand Dollars (\$22,000.00), to cover all tanks, pipe, valves, fittings, buildings, boilers, and all other materials now situated on your Casmalia refining and producing property, plus pipe line running from the aforesaid property to and including loading rack adjacent to the railroad track, one-half mile west, including boiler and other incidental materials. We exclude the following items:

(Plaintiff's Exhibit No. 2)

Superintendent's house, garage and building now used as a cow barn,

Main incoming water line, and such line as needed to supply house and cow barn,

Six large steel storage tanks, approximately 50,000 barrels each,

Six shell stills, plus one shell still bottom previously sold to the O. C. Fields Company.

Certain 4 Inch Tubes previously sold to the West Coast Oil Company.

Cashier's Check in the sum of Twenty-Two Thousand Dollars, (\$22,000.00), will be paid you within Ten (10) Days after notification of acceptance of this bid.

2—Richfield Oil Corporation—12/10/40.

Bidder desires six months' time within which to remove all of the above-mentioned merchandise; retains the privilege of leaving any brick, galvanized tanks and other debris which is not useable; but guarantees not to create any hazards for cattle by creating any pitfalls, other than those which now exist.

Hoping to have an immediate acceptance, favoring us with this material, we remain

Very truly yours,

AARON FERER & SONS

BY Morris Ferer

Morris Ferer

L.

[Stamped]: Received Dec. 11, 1940, 8 o'clock. Purchasing Dept.

[Stamped]: Plf's Ex. No. 2. Filed 9/3/42.

(Testimony of Harold E. Davis.)

Q. I show you a letter, dated December 10, 1940, on the letterhead of Aaron Ferer, addressed to Richfield Oil Company, and ask you if you are familiar with that letter.

A. Yes, sir; I am.

Q. Then, per the stipulation, it is the letter that has been introduced in evidence and has been marked?

A. Yes.

Q. Do you recall where you first saw that letter, Mr. Davis?

A. On my desk.

Q. I show you another letter, on the letterhead of Richfield Oil Company, signed by Mr. Kelly, that has heretofore been offered by the plaintiff as Exhibit No. 3 for identification, and ask you if you are familiar with that letter of January 2, 1941.

A. Yes, sir; I am.

Mr. Sturzenacker: We will offer this, may it please the court, in evidence, to bear the same number that it bore for identification, No. 3.

The Court: It will be so admitted and marked.

[PLAINTIFF'S EXHIBIT No. 3]

RICHFIELD OIL CORPORATION

Richfield Building    .    Los Angeles    .    California

January 2, 1941

Aaron Ferer & Sons  
5585 East 61st St.  
Los Angeles, Calif.

Attention: Mr. Morris Ferer

Gentlemen:

Confirming our telephone conversation of today, we hereby accept your offer, dated December 10th, in the amount of \$22,000.00, for all tanks, pipe, valves, fittings, buildings, boilers, tank car loading facilities and other material and equipment belonging to Richfield, located on our Soladino Lease in Casmalia, with the following exceptions:

Superintendent's house, garage and building now used as a cow barn.

Main water line and pipe line necessary to supply house and cow barn.

Six steel storage tanks, Co. Nos. PR-29230, 29231, 29238, 29239, 29240, 29241.

Six shell stills and two still bottoms, including connections and such firebrick at the location of the stills required by O. C. Field Gasoline Co.

Tubes and other equipment at the Retort previously purchased by the Mid-Coast Oil Company.

Twelve dehydrators belonging to Petroleum Rectifying Co.

It is agreed that you will furnish us with Cashiers Check in the amount of \$22,000.00 within ten days after date of



(Plaintiff's Exhibit No. 3)

this letter and that all tanks will be removed and debris disposed of and pits and ditches filled in, leaving property in a good clean usable condition.

Very truly yours,

RICHFIELD OIL CORPORATION

H. H. Kelly

H. H. KELLY, Purchasing Agent

HED:ad

[Stamped]: Paid 12530 1/7/41.

[Written on margin]: Plffs. Ex 3 for Iden. Dep of Morris Ferer, Aaron Ferer & Sons vs. Richfield. 2/7/42. Ross Reynolds, Notary Public.

Pltf's No. 3, Filed 9/3/42.

Q. By Mr. Sturzenacker: Now, I show you a piece of thin white paper, typewritten, marked "Sale of Materials and Equipment at Casmalia," which has heretofore been offered by [52] the plaintiff as Exhibit No. 1 for identification, and ask you if you are familiar with this memorandum or note. A. Yes, sir.

Q. Can you tell us who prepared this?

A. I did.

Q. This letter down at the bottom says, "H. E. D." Are those your initials? A. Yes, sir.

Q. And "January 8, 1941." Does that indicate the date when it was prepared? A. Yes, sir.

Mr. Sturzenacker: We would like at this time to offer this in evidence with the same number, Plaintiff's Exhibit No. 1.

The Court: It may be admitted and so marked.

## [PLAINTIFF'S EXHIBIT No. 1]

SALE OF MATERIAL AND EQUIPMENT  
AT CASMALIA

To Aaron Ferer and Sons, 5585 E. 61st St., Los Angeles

Payment: Cashier's or Certified Check in the amount of  
\$22,000.00, payable in advance.

Material purchased for resale, Purchaser to be allowed  
six months for removal.

Everything will be sold to the above with the exception  
of the following:

1. 12 dehydrators belonging to Petroleum Rectifying Co.
2. Water pump, water storage facilities and water piping which services Superintendent's house and cow barn.
3. Superintendent's house and garage, & frame house PR-17318.
4. 6 shell stills and 2 extra still bottoms, including connections which are affixed thereto up to and including the first flange in the piping hook-up. (Previously sold to O. C. Field Gasoline Company)
5. Material and equipment sold to the Mid-Coast Oil Company, not yet removed from the property.
6. 6 tanks, Nos. PR-29230—Capacity 55,000 barrels

29231	“	“	“
29238	“	5,700	“
29239	“	10,050	“
29240	“	30,190	“
29241	“	37,250	“

(Plaintiff's Exhibit No. 1)

Purchaser shall remove all oil in tanks from the property, debris to be disposed of on the property by placing in the washed-out portions of a creek running through the Refining Property in such a manner that the normal course of the stream is not restricted.

The two large sumps on the North side of the above referred to creek across from the Refinery should be fenced

properly ~~finished~~, using salvage pipe for post and sand line for wire to prevent cattle from getting bogged down in the sumps during wet weather.

All ditches and pits should be filled in after removal of pipe and other equipment and left in safe condition.

Concrete buildings and foundations on the Refinery Property will not constitute a hazard and therefore can be left in place.

HED:ad

Jan. 8, 1941

[Stamped]: Plf's Ex. No. 1. Filed 9/3/42.

[Written on margin]: Plffs Ex 1 for Iden Ferer vs Richfield Dep of Clements 2-6-42 Ross Reynolds, Notary Public

Q. By Mr. Sturzenacker: Mr. Davis, calling your attention to Plaintiff's Exhibit No. 2, this offer, it says, "We are pleased to submit our bid in the sum of \$22,000 to cover all tanks, pipe, valves, fittings, buildings, boilers, and all other materials now situated on your Casmalia refining and producing property, plus pipe line running from the aforesaid property to and including loading rack

(Testimony of Harold E. Davis.)

adjacent to the railroad track, one-half mile west, including boiler and other incidental materials. We exclude the following items” and then appears “superintendent’s house, car barn”, and so forth. Did you have any inventory of that property on [53] the Casmalia lease at that time?

A. We had an inventory that was several years old.

Q. Was that the same inventory that you were speaking of a moment ago, that included the stuff that you sold to Mr. Anderson?

A. The particular inventory I am referring to was primarily a refinery department inventory.

Q. You have no inventory of the remaining producing property, is that right?

A. Well, there probably was one in the company but I didn’t have one in my possession.

Q. You were not familiar with it?

A. That is right.

Q. Were you familiar with all of the tanks that were on the property? A. In what respect?

Q. Well, did you know how many there were and what kind they were? A. No.

Q. You did know at that time when you received this bid from Mr. Ferer that your company was to reserve six large steel storage tanks? A. Yes, sir.

Q. There were how many storage tanks on the property? Do you recall?

A. I haven’t any idea. [54]

Q. There were more than six, however, were there not? A. Yes; there were.

(Testimony of Harold E. Davis.)

Q. As a matter of fact, there were more than 25, is that right? A. I imagine there were.

Q. These storage tanks were connected with the producing unit rather than the refining unit, were they not?

A. Which ones do you mean? All of them?

Q. Well, what were and what were not?

A. There were a few tanks immediately surrounding the refinery property which were used in connection with refining.

Q. And the rest of them?

A. I assume the rest of them were production tanks.

Q. And these six steel storage tanks that you reserved—do you remember where they were?

A. I believe that—let's see. I think most of them were on the north side of the creek, near the machine shop.

Q. Just north of the creek?

A. I believe they were. There might have been one of them south of the creek.

Q. All of the other property in this reservation, such as the stills and the 4-inch tubing, had previously been sold to someone else?

A. Will you repeat that question, please?

Q. I notice in the offer it says, "6 shell stills, plus one shell still bottom—" [55]

A. That is right.

Q. "—previously sold to the O. C. Fields Company", is that correct? A. That is right.

Q. Had you conducted that sale? A. Yes, sir.

(Testimony of Harold E. Davis.)

Q. And "Certain 4-inch tubes previously sold to the West Coast Oil Company"?      A. That is right.

Q. Had you conducted that sale?

A. Is that the West Coast?

Q. That is what this offer says, yet that name doesn't sound quite right. Had you conducted that sale?

A. Yes, sir; I had.

Q. And you were reserving the superintendent's house and garage and the building now used as the cow barn?

A. That is right.

Q. When you were up there in September, was that building being used as a cow barn?

A. I don't know.

Q. Were there any cows around the place?

A. I didn't notice any.

Q. Was there any oil stored at that time in any of these tanks?

A. I think most of them had a little oil.

Q. And one of them had considerable oil that was sold [56] to the Casmite Company or stored for the Casmite Company, is that right?      A. That is right.

Q. In this Exhibit No. 3, which is the letter of acceptance of January 2, I notice the steel tanks carry numbers.      A. Yes, sir.

Q. Did you provide those numbers or Mr. Kelly or how are they provided? Do you know?

A. Those numbers were put on by the operating department.

Q. And 12 dehydrators, belonging to the Petroleum Rectifying Company, are mentioned in this acceptance. Do you know anything about those?

A. Only that they belonged to that particular firm.

(Testimony of Harold E. Davis.)

Q. And your company had never owned them?

A. That is right.

Q. This letter states as follows: "Confirming our telephone conversation of today." Did you have that telephone conversation? Do you remember having a telephone conversation, on or about the 2nd of January, with Mr. Ferer?

A. If I wrote the letter, I am sure I did.

Q. No; Mr. Kelly wrote the letter. It says, "Confirming our telephone conversation of today, we hereby accept your offer, dated December 10th, in the amount of \$22,000, for all tanks, pipe, valves, fittings, buildings, boilers, tank car loading facilities and other material and equipment belonging to Richfield, located on our Soladino lease in [57] Casmalia."

A. Yes; I had the telephone conversation.

Q. I notice the notation on the bottom of this—or it is signed by Mr. Kelly?

A. That is right.

Q. And it has the same initials?

A. Yes.

Q. And, therefore, you probably dictated the letter?

A. I dictated the letter.

Q. At this telephone conversation that you had with Mr. Ferer, did you talk to him about any other exceptions except those—I will withdraw that question. At this telephone conversation, did you discuss with Mr. Ferer excluding any other property from the sale except that mentioned in this letter of December 10, 1940?

A. I think not.

Q. Did you speak to him about these 12 dehydrators that were on the property but didn't belong to you?

A. I think that is covered in the letter, isn't it?

(Testimony of Harold E. Davis.)

Q. You don't remember having any conversation with him about it?

A. I might have but I don't remember the exact words of our conversation. But the letter was written immediately afterwards, which would indicate that we had covered everything in the letter.

Q. And the information that you got about the storage [58] tanks came to you from the producing department as to the numbers?

A. Yes, sir; that is right.

Q. When Mr. Ferer came into your office on the 8th of January, the day he paid the money and you made up this notation, from what note or memorandum did you make up this notation? I notice you have six shell stills and two extra still bottoms, whereas the original offer said six shell stills plus one shell still bottom.

A. What did the note say?

Q. The note says two extra still bottoms. Did you discuss that with Mr. Ferer?

A. Evidently we did because I believe that note was written when Mr. Ferer was there.

Q. He was present, as a matter of fact, while you dictated this and you handed it to him?

A. I think he was; yes.

Q. I notice also on this notation you stated, "Purchaser shall remove all oil in tanks from the property." That was oil that had been produced on those premises so far as you know?

A. As far as I know, it had been produced.

Q. It hadn't been stored there by Richfield so far as you know? A. I don't think so.



(Testimony of Harold E. Davis.)

Q. And "The two large sumps on the north side of the [59] above referred to creek across from the refinery should be properly fenced, using salvage pipe for posts and sand line for wire to prevent cattle from getting bogged down in the sumps during wet weather." Do you remember putting that in? A. Yes, sir.

Q. What were you using this property for when you sold this equipment to Mr. Ferer?

A. I don't know what it was being used for. Nothing, I presume.

Q. How did you happen to put in the clause that it was to be fenced so the cattle couldn't get into the sumps?

A. There may have been cattle grazing around there. However, that is a problem that is taken care of by the operating department again.

Q. Did someone in the operating department tell you to do that, Mr. Davis? A. Oh, sure.

Q. What is that? A. Yes, sir.

Q. In other words, that instruction would come to you from the operating department?

A. Yes, sir.

Q. You and the purchasing department were not interested in running cattle on this property particularly? That wasn't part of your job?

A. That is right. [60]

Q. You also added in here, "All ditches and pits should be filled in after removal of the pipe and other equipment and left in safe condition." Do you remember from whom you got that instruction?

A. I believe it was part my idea.

(Testimony of Harold E. Davis.)

Q. And that was to fulfill the previous clause relative to the instructions you had received from the operating department, their suggestion to prevent the cattle from getting bogged down in the sumps and so forth?

A. Yes, sir.

Q. You stated, "All ditches and pits should be filled in after removal of pipe." You knew that the pipes in Casmalia on the lease there that were to be removed were, some of them, below the ground, did you not?

A. Yes, sir.

Mr. Paradise: What pipes?

Mr. Sturzenacker: I don't know.

Q. Did you know that there were pits on the property in which pipe was located?

A. Pits in which pipe was located?

Q. Yes. You say here, "All ditches and pits should be filled in after removal of pipe."

A. It is possible in removing any pipe lines which were underground that pits and ditches would, naturally, be made which were to be filled in after those pipe lines were removed. [61]

Q. Do you know of any open pits that existed on the ground or on the lease that didn't have anything of salvage equipment in them?

A. I didn't make a complete personal survey of the property myself. So I don't know. There may have been some pits that had nothing in them except just it was a pit, is all.

Q. I understand this ground is rather uneven and sort of rugged, is that right? A. That is right.

(Testimony of Harold E. Davis.)

Q. Was it possible for you to see on your trip up there, while you were examining the refining unit, pipe lines that ran from there to other tanks in the field?

A. Yes.

Q. Did you see any of them above the ground?

A. Yes, sir.

Q. And did you see any pipes coming out of tanks and entering the ground?

A. Yes, sir.

Q. And then you saw other tanks where the pipe line was coming up out of the ground and going into the tanks?

A. That is right.

Q. At this telephone conversation that you had with Mr. Ferer, do you recall what was said about accepting his bid?

A. No; I don't.

Q. But, in response to that telephone call, he and Mr. [62] Clements came to your office, is that right?

A. I believe a letter was written after that accepting his bid.

Q. That is right; a letter was written. And then they arrived at your office. And was anybody with them when they came?

A. All that I know of was just Mr. Clements and Mr. Ferer.

Q. And did you have any conversation with the two gentlemen at that time?

A. Yes, sir.

Q. And what was that conversation? Do you recall?

A. As I recall, Mr. Clements asked what our reason was for not selling the six remaining tanks or the six tanks which we were excepting, and I called Mr. Mont-

(Testimony of Harold E. Davis.)

asked him why he wanted to retain those tanks and he explained again to me that it was for the purpose of storing oil in the event of and when we might reopen some of the wells for production.

Q. You told that to Mr. Clements and to Mr. Ferer?

A. That is right.

Q. Was anything said then about the pipe line that ran up to those particular tanks?

A. I don't know whether it was said at that particular time but I know that the pipe lines connecting or inter-connecting those tanks were to remain on the property. [63]

Q. And the pipe lines up to the tanks were sold?

A. Up to a certain point.

Q. Well, how far up to a certain point? How high is up? In other words, how close to the tanks?

A. Those were marked on the property, I imagine, around three or four hundred feet away from the tanks except any pipe lines interconnecting those six tanks we were to retain.

Q. Did you make any note of the exclusion of those pipe lines leading to those tanks on either this note or in any conversation with Mr. Ferer? Did you tell him that those pipe lines to those tanks were to be excluded?

A. That certain portion of the pipe lines?

Q. Yes. A. I believe it is in the contract.

Q. You are familiar with the contract that was finally adopted, are you not? A. Yes, sir.

Mr. Krasne: Perhaps Mr. Paradise will stipulate that there was no exclusion for any of the pipe line running up to those tanks provided for in the contract.

(Testimony of Harold E. Davis.)

Mr. Paradise: No; that is not correct. They were excluded. I might perhaps save time, because there is no mention of that in the contract, by saying the exclusions are shown on the map, Mr. Sturzenacker, if you care to borrow that.

Q. By Mr. Sturzenacker: Will you glance through this contract, Mr. Davis, and show me if there is any place in the [64] contract that excludes the pipe lines running up to the tanks?

A. Here is one place, Mr. Sturzenacker.

Q. Where is it? A. Right here.

Q. You are pointing now to "and major suction and discharge oil pipe lines connecting such tanks approximately as indicated in red on the map attached hereto and marked Exhibit A"? A. That is right.

Q. Did you discuss with Mr. Ferer and with Mr. Clements those pipe lines when they were in your office on the 8th of January?

A. I imagine we did. We discussed the deal pretty much in general that day.

Q. Will you please give us the best of your recollection? Your imagination is good all right and I appreciate that you are trying to refresh your memory. But will you tell us whether or not the best of your recollection now is that you did discuss those pipe lines running to and from those tanks? A. I believe we did.

Mr. Sturzenacker: Mr. Krasne, was the map introduced heretofore? We were working with a map here in the courtroom one day.

Mr. Krasne: That was at Mr. Paradise's office in the taking of the depositions. [65]

(Testimony of Harold E. Davis.)

Mr. Sturzenacker: May I use this, then, Mr. Paradise?

Mr. Paradise: If it would be helpful to the court, your Honor, this original contract has the map attached to it and you may introduce it.

Mr. Sturzenacker: Good.

The Court: Shall we give that an exhibit number, then?

Mr. Sturzenacker: I think we might as well and refer to it.

The Court: Mark it, then, as the plaintiff's exhibit next in order. That will be No. 4.

The Clerk: Have we finished with the deposition numbers?

Mr. Sturzenacker: I don't think it was introduced in the deposition.

The Court: The clerk calls attention to the fact we may want to use Exhibit No. 4.

Mr. Paradise: That is Defendant's Exhibit No. 1, if the court please, attached to the other deposition.

The Clerk: That will be Plaintiff's Exhibit No. 4.

[PLAINTIFF'S EXHIBIT No. 4]

[Plaintiff's Exhibit 4 is identical to Exhibit "A" to Amended Complaint, heretofore printed at page 26 except for map attached to Exhibit 4, and is therefore omitted at this point.]

[Stamped]: Plf's. Ex. No. 4. Filed 9/2/42.

(Testimony of Harold E. Davis.)

Q. By Mr. Sturzenacker: Referring to Plaintiff's Exhibit No. 4, which is the original contract and the map attached thereto, I call your attention to some red lines around a circle, which is marked "Riveted steel tanks" and so forth. Are these tanks that are marked in red the six tanks that were referred to in the exceptions to the contract? A. Yes, sir.

Q. And the red lines leading from tank to tank are the [66] lines that you referred to that were excepted?

A. That is right.

Q. Calling your attention to the various other wells about the premises, were there any wells or any other tanks—I will withdraw that question. From any of these wells were there any pipe lines leading to any of the tanks?

A. I don't know.

Q. Well, were there any of these pipe lines excepted or did you discuss excepting any of the pipe lines from these other tanks or wells?

A. We discussed excepting the water lines that were to be used to serve water to the superintendent's house and the cow barn or, rather, the watering trough for the cattle and also the gas line which was to be used for bringing gas from one or more wells, whichever was necessary, in order to furnish the superintendent's house with gas.

Q. This is the superintendent's house that I am indicating here, is it not? A. Yes; that is it.

Q. And that was the house that was excepted and this is the barn that was excepted. And which is the pipe line, the gas pipe line, that is excepted?

A. This one.

(Testimony of Harold E. Davis.)

Q. The one running along from the portion near well No. 36?

A. I presume that is the number. It looks like it. [67]

Q. With the exception of that and the water lines you have indicated by the cow barn and so forth, were any other lines reserved from sale under this contract?

A. One thing is that we excepted any other extensions or any extensions to the gas line which might go to any other wells if necessary in order to have additional gas.

Q. Did any other extensions go from that to any other well?      A. I have no record of that.

Q. You have no knowledge of it?      A. No, sir.

Mr. Paradise: When you say lines, do you mean pipe lines, Mr. Sturzenacker?

Mr. Sturzenacker: I am speaking of pipe lines and I am speaking primarily of oil and gas lines and not water lines.

Q. There was also a line running from your property to a loading zone, was there not?      A. Yes, sir.

The Court: May I interrupt to suggest that I shall have to meet with one of the other judges briefly and we will take a recess at this time?

(Short recess.)

The Court: You may proceed.

Mr. Sturzenacker: May I have the last question and answer, Mr. Reporter?

(Record read by reporter.) [68]

Q. It should be loading rack instead of loading zone, is that right?      A. Yes, sir.



(Testimony of Harold E. Davis.)

Q. Do you know where that loading rack was, the general direction from this battery of pipes, for instance?

A. Well, I don't know which is north.

Q. I presume the top of the map is north.

A. I would say in a southwesterly direction.

Q. And that pipe line was included in the sale of equipment to Mr. Ferer? A. Yes, sir.

Q. Do you know what the condition of that pipe line was? A. No, sir.

Q. Do you know whether it was in good shape or bad shape? A. No; I don't.

Q. There were other pipelines, were there not, running from these tanks that were excluded, with the red lines around them, from the various wells on the property or from various tanks situated near the wells on the property?

A. That were excluded, did you say?

Q. No. There were pipelines running from tanks in various portions of the field to these tanks that were excluded?

A. I don't believe so. I believe that the lines that were excluded were the interconnecting lines here. Inci- [69] dentally, we discussed this thing in a very general way and Mr. Ferer and Mr. Clements both in our discussions stated any of these lines we wished to leave in here they were willing to have them remain.

Q. Those were communicating lines between the tanks you were reserving? A. That is right.

Q. But you did not reserve any of the lines running from any of these particular tanks to any of the wells on the property?

(Testimony of Harold E. Davis.)

Mr. Paradise: I think the map speaks for itself, Mr. Sturzenacker. The map shows in red the particular pipe-lines that were to be excluded in accordance with the provisions of the contract.

Mr. Sturzenacker: Will you stipulate with me, Mr. Paradise, that none of these lines as indicated on the map ran to any of the wells on the property?

A. Pardon me; I might point out this particular line here which appears to be going to some location over in this direction but that was only another line that was generally included in the surrounding tanks.

Q. None of those lines that are in red go to any wells, do they? I mean the lines that are around the tanks, with the exception of the gas line that you referred to a few moments ago.

A. I don't believe they do. [70]

Q. Do you know anything about the condition of the various oil lines that ran from the oil wells to various tanks and from those tanks to these tanks, that were reserved? Do you know anything about the condition of those lines?      A. No, sir.

Q. As far as you know, they were in good condition?

A. They might have been.

Q. And they could have been used in the event they were going to produce from any of these particular wells?

Mr. Paradise: I object to that. The witness has stated he doesn't know the condition of the lines.

The Court: Wouldn't that be argumentative in view of his testimony?

Mr. Sturzenacker: I think that is right. I will withdraw the question.

(Testimony of Harold E. Davis.)

Q. Do you have any knowledge of the system used by the previous operators of this field for the purpose of gathering and moving the oil produced from this field?

A. None other than might be indicated by the fact that there were smaller lines on the inside of the large gathering lines.

Q. And that would indicate to you what, Mr. Davis?

A. That they might have been steam lines used to heat the oil.

Q. And those are commonly called gut lines, are they not? [71]

A. I never heard that term before.

Q. They shove live steam through the line for the purpose of heating the oil and making it run, is that right?

A. Yes, sir.

Q. I think it is understood but for the purpose of the record it is your understanding that the oil originally produced from this field is of low gravity?

A. I would assume that.

Q. You never saw any of it or saw it produced?

A. I have seen the oil in those tanks up there but I don't know what gravity it was.

Q. These steam lines were connected with boilers and other equipment on the field that were used for heating steam and running it through the lines?

A. I imagine they would be hooked up to boilers or were at one time.

Q. The boilers were still there, were they not?

A. Some of them were.

Q. And those boilers were included in the sale of merchandise to Mr. Ferer?

A. Yes, sir.

(Testimony of Harold E. Davis.)

Q. You have mentioned certain of these articles that you had previously sold or knew of their disposal and, naturally, you excepted those. From what source, other than the production department, did you get any instructions as to what material you were to exclude from this sale? [72]

A. From the sale to Mr. Ferer?

Q. Yes.

A. We excluded the sale of material that had previously been made to this Mid Coast Oil Company or West Coast, although I think it is Mid Coast.

Q. And you excluded the sale to O. C. Fields that you had made and you excluded the dehydrators which you knew didn't belong to them? A. That is right.

Q. Except from the production department, did you get any instructions from anybody else to exclude anything else in this sale?

A. I believe we asked the refinery department if they wanted any of the material or equipment that they might use on some other facility in some of our other operations.

Q. Did they ask you to exclude any property?

A. Not to my knowledge.

Q. Then, would you state from your knowledge that no department except the refinery department asked you to exclude any of this property?

A. My information came from the production department.

Q. I beg your pardon. I mean from the production department. A. No.

(Testimony of Harold E. Davis.)

Q. And they told you to exclude these tanks and the pipes running from the tanks? [73]

A. That is right.

Q. Who gave you an instruction to exclude the superintendent's house and the cow barn? Do you recall?

A. Mr. Montgomery.

Q. From the production department?

A. That is right.

Q. Did the production department at any time instruct you to exclude from sale pipe in the wells?

A. There was no specific mention made of the casing in the wells.

Q. After discussing with Mr. McGahan—I will withdraw that question. Did you discuss with anybody outside of the Richfield the sale of these salvage goods?

A. I discussed it with Mr. Clements and Mr. Ferer.

Q. I mean besides Mr. Clements.

A. I don't believe so.

Q. Did you receive any bids for any of this equipment or all of it besides the bid from Aaron Ferer?

A. Yes.

Q. Did those—

A. Pardon me; I would like to correct a statement I made. I did discuss the sale of this equipment on the outside with one other person.

Q. Can you tell me who that was?

A. Tom McGeeny of the Union Oil Well Supply Company at Long Beach. [74]

Q. The Union Oil Well Supply Company?

A. I happened to see him on the property at the time I made a survey of it with Mr. McGahan.

(Testimony of Harold E. Davis.)

Q. When you were up there in September?

A. That is right.

Q. Did you receive any other bids from any other person for the purchase of any equipment on the Casmalia lease except Aaron Ferer's bid?      A. Yes, sir.

Q. And were those bids directed to you or were they relayed to you by somebody else in the company?

A. I believe they were directed to Mr. Kelly.

Q. And then were they given to you?

A. Yes, sir.

Q. Isn't it a fact that Mr. Ferer's bid was some considerable more money than any other bid offered for the purchase of equipment on the Casmalia lease?

Mr. Paradise: I object to that, if the court please. Does the court feel that bids received by Richfield from other parties in connection with the same sale are material to this inquiry?

The Court: I think the question in its present form is open to criticism. I don't think the foundation has been laid to show the relevancy of going into these other bids.

Mr. Sturzenacker: I will withdraw the question, may it please the court. [75]

Q. How many other bids did you receive?

A. We had a number of different types of bids. Some bids were submitted on buildings only and some on other individual pieces of equipment.

Q. Were there any bids from anybody that read as Mr. Ferer's bid, to cover all tanks, pipes, valves, fittings, and all other materials now situated on your Casmalia refining and producing property, plus the pipe rack adjoining—

(Testimony of Harold E. Davis.)

Mr. Paradise: I object to that on the ground that there is no proper foundation.

Mr. Sturzenacker: I wasn't quite through.

Mr. Paradise: I beg your pardon.

Q. By Mr. Sturzenacker: —adjacent to the railroad track, one-half mile distant, including the boiler and other incidental materials, and excepting those articles set forth in Mr. Ferer's letter of December 10?

Mr. Paradise: I object to that on the ground it is wholly immaterial to the issues in this case and, further, that it is not the best evidence.

The Court: I was going to make this observation. I think it would be pertinent at least to examine these other bids and from such examination determine to what extent, if any, such bids would be admissible. From an examination of the bids, and I assume from what has thus far taken place that the bids were in writing, I think we can best determine whether or not an objection of the character now being [76] offered is well taken or not. Do you wish counsel to produce these other bids so that we might make a preliminary inquiry as to whether or not any of them are admissible in evidence? If so, we would then learn their contents.

Mr. Sturzenacker: Have you those, Mr. Paradise?

Mr. Paradise: May I ask Mr. Davis a question?

The Court: Surely.

Mr. Paradise: Were all of the other bids that you received in writing? A. I believe they were.

Mr. Paradise: I can produce all of those we have, your Honor.

(Testimony of Harold E. Davis.)

Q. By Mr. Sturzenacker: After you received this bid from Mr. Ferer—it came direct to you, did it not?

A. It came to Mr. Kelly and then to me.

Q. With whom did you discuss it, if anybody?

A. I discussed it with Mr. Kelly. Later on—

Q. At Mr. Kelly's request, did you call Mr. Ferer and accept his bid?

The Court: May I interrupt to say that I think the witness was about to add something to the answer to the previous question?

Mr. Sturzenacker: Pardon me.

Q. Had you finished your answer?

A. I was going to say and later on Mr. McGahan.

The Court: Now, will you read the pending question?  
[77]

(Question read by reporter.)

A. Yes, sir.

Mr. Sturzenacker: That is all.

#### Redirect Examination.

Q. By Mr. Paradise: Mr. Davis, I believe you testified that in connection with this sale of tubing and sucker rods and the derricks to Mr. Anderson you had an inventory of the tubing and sucker rods?

A. Yes, sir.

Q. Where did you receive that?

A. From the production department.

Q. Do you know whether that was a recent inventory that had been made at that time?

A. It is my understanding that it was an inventory that had been prepared or a record, rather, that had been prepared of the installations as they were made during the time when the property was operated.



(Testimony of Harold E. Davis.)

Q. That was at what time?

A. I don't understand that question.

Q. Do you mean at the time the property was operated prior to 1926? A. That is right.

Q. The inventory had been prepared prior to that time? Is that your statement?

A. That is my idea. [78]

Q. What was the condition of the derricks at that time? Do you know?

A. Some of them had fallen down and those remaining erect were in pretty bad shape.

Q. Of what material were they composed?

A. Wood.

Q. I believe you also testified that under that arrangement with Mr. Anderson he was not required to remove all of the tubing and sucker rods from the wells that were covered?

Mr. Sturzenacker: Just a minute. Didn't we agree that we would look at the contract for that and you moved to strike the testimony of this witness because of that contract? Isn't that correct?

Mr. Paradise: That is correct but I was going to inquire about a matter aside from the contract. This is merely preliminary.

Mr. Sturzenacker: All right; no objection.

Q. By Mr. Paradise: What was the purpose in not requiring Mr. Anderson to remove all of the tubing and rods from those wells?

Mr. Sturzenacker: I object to that. It calls for a conclusion of the witness.

(Testimony of Harold E. Davis.)

The Court: The question, I think, perhaps needs to be reframed. Counsel might make the question possibly a little bit more specific so as to bring out any fact within the witness' knowledge as distinguished from his interpretation [79] of the fact.

Q. By Mr. Paradise: Are you familiar with the work that Mr. Anderson was required to do under that contract? A. Yes, sir.

Q. Was he required to pull the tubing from the wells?

A. That which he could recover.

Q. In what manner would he fail to recover tubing from the wells?

A. In the event any of the tubing might have been parted.

Q. Do you know if there was some reason at that time why he was not required to pull all of the tubing from the wells?

The Court: That is, if there was any condition existing?

Mr. Paradise: Yes.

Mr. Krasne: I object to that on the ground it is incompetent, irrelevant and immaterial. This witness testified that he had never gone up to see the property or the condition of the equipment until a time after Mr. Anderson's work had already been completed.

The Court: Obviously, the witness should testify only to those matters within his knowledge.

Q. By Mr. Paradise: Do you know of any reason why Mr. Anderson was not required to remove the tubing from the wells, entirely aside from the condition of the tubing itself?

(Testimony of Harold E. Davis.)

A. It was my understanding that they didn't want to take [80] any chance on hurting the casing in the wells.

Q. How could the casing in the wells be hurt?

Mr. Sturzenacker: Just a minute. I move that answer be stricken as a conclusion of the witness and it is hearsay.

The Court: I rather think the objection is well taken. Did you say that you handled the so-called Anderson deal? A. Yes, sir.

The Court: The witness has been interrogated relative to various aspects of the Anderson deal and that, I think, opens the door to asking him as to what, if anything, was done or said during the negotiations which took place at the time of entering into that transaction relative to whether or not there were any circumstances under which Anderson would not be required to remove all of the tubing.

Mr. Krasne: Certainly, any conversations between Mr. Davis and Mr. Anderson would be hearsay in so far as the plaintiff is concerned. In response to the plaintiff's question, I think this witness has heretofore testified that he wasn't familiar with the equipment and wasn't familiar with that situation but just knew that the sale had been made and that the sale was for all that could be recovered. Certainly, that would not open the door on redirect examination to conversations that would otherwise be hearsay nor would that qualify this man as an expert as to why certain of the pipe wasn't removed and certain pipe was removed.

The Court: I think we must agree that the witness has [81] not been qualified as an expert. He has been asked as to what took place relative to that deal and he

(Testimony of Harold E. Davis.)

has been asked as to whether or not all of the tubing was to be removed, which I think was all elicited on the earlier examination of the witness. Now, it appearing that this was the witness who handled the deal for the defendant, and I am speaking now of the Anderson deal, I think, so far as he has knowledge thereof, he should be allowed to state whether or not as a part of that deal anything was said or done relative to making any distinction between the tubing that could be removed and the tubing that could not be removed.

Mr. Krasne: We object, further, on the ground that it is not the best evidence and the contract will speak for itself when produced by counsel. Certainly, we are not going to let this witness testify to a lot of collateral things and conversations when counsel himself has suggested that the contract should indicate what the deal was.

The Court: It may be necessary to bring this witness back when you produce that contract.

Mr. Paradise: Very well.

Q. What instructions did you receive from the production department, Mr. Davis, with respect to the items of equipment that were to be excluded from this sale? Or, first, let me ask you with whom did you talk in the production department about this?

A. Mr. Montgomery. [82]

Q. And who is Mr. Montgomery?

A. He is the manager of our production department.

Q. When did you have this conversation with him?

A. The first conversation I had with him was, I believe, sometime in September or October of 1940.

(Testimony of Harold E. Davis.)

Q. Was that before or after Mr. Kelly had instructed you to make arrangements for this proposed sale?

A. That was after Mr. Kelly had done that.

Q. Where did these conversations take place? I mean the conversations with Mr. Montgomery.

A. Where did they take place?

Q. Yes. A. In the Richfield Building.

Q. Will you state what was said in those conversations?

Mr. Sturzenacker: We object to it. It is not proper cross-examination and is hearsay.

Mr. Paradise: If the court please, I believe the plaintiff has waived any possible objection that it might have on that ground. On some five or six occasions during his direct examination he inquired of this witness what conversations this witness had with other members of the Richfield organization and also as to what instructions he had, and he also asked if the production department had ever asked him to exclude the casing in the wells. It is perfectly proper for him to explain the entire conversation.

Mr. Sturzenacker: That was on cross-examination; not [83] direct examination.

Mr. Paradise: That is what I meant.

The Court: Doesn't it seem logical, if the witness has been allowed to go into the matter of these conversations which involved the obtaining of these instructions, that the door is open to inquiring as to just what was the nature of those conversations, which is another way of asking what were the instructions? I think the question is pertinent and admissible and the objection is overruled.

(Testimony of Harold E. Davis.)

Mr. Paradise: Will you read the question, Mr. Reporter?

(Question read by reporter.)

The Court: Of course, I think the question will need to be split up instead of going into several conversations in answer to one question.

Q. By Mr. Paradise: I mean to limit this, Mr. Davis, to the first conversation that you had with Mr. Montgomery after receiving your instructions from Mr. Kelly to arrange for the sale of this salvage equipment.

Mr. Krasne: Will you fix the date a little more accurately, Mr. Paradise?

Q. By Mr. Paradise: Can you fix the date?

A. I would still think it was sometime in September or October, possibly the first part of October or late September.

Q. And at that conversation was there anyone present except you and Mr. Montgomery?

A. No. We just merely discussed the fact that this was [84] up for sale before it was submitted.

Q. Did you go to Mr. Montgomery's office?

A. I believe I called him on the phone.

Q. What did you tell Mr. Montgomery?

A. That this equipment, of course, as he knew, was up for sale and asked him—

Q. I can't hear you. I am sorry.

A. That the equipment was up for sale and I asked him to give us an inventory of what items, what surface items, he wanted reserved and not sold off of the property.

(Testimony of Harold E. Davis.)

Q. Did you identify the equipment that you said was up for sale?

A. Of course, my instructions had been to make a survey and make arrangements and obtain the information from the necessary operating heads as to what equipment was to be retained. Let's see; I am confused on that now.

Q. Is that the reason you called Mr. Montgomery?

A. That is right.

Q. In your conversation did you mention Casmalia?

A. Yes.

Q. Did you tell Mr. Montgomery the nature of the equipment which you were contemplating selling?

Mr. Krasne: Let's just ask him for the conversation.

Mr. Paradise: All right.

Q. Will you repeat the conversation fully?

A. I would like to go back a little further on that, [85] Mr. Paradise, and explain to the court that I had received instructions from Mr. Kelly to make arrangements to dispose of all the obsolete and surplus surface equipment located at Casmalia. Part of the duties of disposing of that equipment would be to find out what items were to be retained by the operating department and make a contact with Mr. McGahan who was the representative of our stores department and submit the equipment and facilities for sale. In first contacting Mr. Montgomery, he stated that there were certain tanks and certain lines which were to be excepted.

Q. Is this the conversation which you referred to before?

A. Yes, sir.

(Testimony of Harold E. Davis.)

Q. What did he state?

A. This was not definitely settled then, what all of the lines were going to be, but Mr. Montgomery told me that he would have a sketch made of the water line running from the water tanks down to the superintendent's house and over to the watering trough for the cattle. The other line, of course, was a gas line running from the superintendent's house over to any of the oil wells which might be necessary or which might furnish gas to the superintendent's house.

Mr. Krasne: Will you speak a little louder? We are having difficulty hearing over here.

A. All right. I think that is about all.

Q. By Mr. Paradise: Did he request any other exclusions?

A. Later on, we got definite information as to the [86] numbers of the tanks and the sizes that were to be excluded, those lines, the interconnecting lines, around the tanks and a line off to the Casmite property. I have already mentioned the gas line and the water lines and the superintendent's house, the dehydrators and the cow barn.

Mr. Krasne: If the court please, we would like to move to strike, first, the portion of this witness' voluntary statement about what instructions he had received from Mr. Kelly and what he was supposed to do. Counsel asked him to repeat the conversation he had had with Mr. Montgomery.

The Court: Yes; I am inclined to think it is not responsive to the question. So that part of the answer will go out.



(Testimony of Harold E. Davis.)

Q. By Mr. Paradise: In this conversation with Mr. Montgomery, did Mr. Montgomery mention any reason why he wanted any of these items excluded?

Mr. Sturzenacker: Just a minute. I object to that as leading and suggestive.

The Court: No; I don't think it is leading and suggestive.

A. In the telephone conversation I had with Mr. Montgomery, at the time that Mr. Ferer and Mr. Clements were present in my office,—

Q. By Mr. Paradise: Pardon me. Is this the same conversation as to which you have already testified or another one?

A. Naturally, I had a number of conversations and this [87] is another conversation.

Q. Confine yourself to the first conversation with respect to which you have already testified.

A. Well, I don't recall whether he specified why he wanted those specific items excepted or not.

Q. I believe you testified you had another telephone conversation with Mr. Montgomery on December 8th, when Mr. Clements and Mr. Ferer were present in your office, is that correct?      A. January 8th?

Q. Yes; is that correct?      A. That is right.

Q. Did you put in the call to Mr. Montgomery in the presence of Mr. Ferer and Mr. Clements?

A. Yes, sir.

(Testimony of Harold E. Davis.)

Q. What prompted that conversation? What occurred prior to that time which caused you to phone Mr. Montgomery?

A. We were discussing the tanks that we were to except and the lines around the tanks and Mr. Clements, I believe it was, asked me why we didn't sell the tanks. He was very anxious to obtain those as well as some of the other equipment.

Q. Are you talking now about the six large tanks that are listed in the contract in paragraph 1, starting with a 55,000 barrel tank?

A. That is right; those are the six tanks that were [88] excepted.

Q. And what did he state?

A. Mr. Clements wanted to know why we wouldn't sell those tanks. And so I called Mr. Montgomery on the telephone and asked him why those tanks were not included in the sale and he said he wanted to retain them in the event that the wells were ever opened up for production; that those tanks would be used as storage.

Q. Did you repeat any part of that conversation to Mr. Clements and Mr. Ferer?

A. I repeated the conversation to them as soon as I hung up.

Q. What did you tell Mr. Ferer and Mr. Clements?

A. I told them that the tanks were not to be sold because the production department wanted to retain them for storage purposes in the event the wells were re-opened.

The Court: We will take a recess until tomorrow morning at 10:00 o'clock.

(Testimony of Harold E. Davis.)

(Whereupon an adjournment was taken until 10:00 o'clock, A. M. the following day, Friday, September 4, 1942.) [89]

Los Angeles, California, Friday, September 4, 1942;  
10:45 A. M.

(Appearances as last noted.)

(Case called.)

Mr. Krasne: Ready.

Mr. Paradise: Ready.

H. E. DAVIS, recalled.

Redirect Examination, resumed.

Mr. Paradise: If the court please, before proceeding with the examination of Mr. Davis, I want to state that, in view of Mr. Krasne's statement to the court yesterday concerning the fact that it was his belief that all that were to be tried were the issues of reformation, I believe the record should be clear that all of the affidavits and depositions which have been admitted in evidence under the court's order, I believe it was, of July 1, as well as the oral testimony that is now being taken, are offered not only under the issues raised by the counterclaim and the reply, that is to say, the two causes of action in the counterclaim and the plaintiff's reply, but also under the issues raised by the plaintiff's complaint and the defendant's answer and that that was my understanding of the court's order.

Mr. Krasne: The order that now stands, I believe, is [90] that the depositions of Mr. Ferer and Mr. Clements are now in evidence, I presume, for all issues, of course, subject to our right of cross-examination and motions and objections and so forth. And I believe the

(Testimony of Harold E. Davis.)

court's indication yesterday was that all of the affidavits which have been filed by the defendant as well as the deposition of Mr. Zeidenfeld are not now to be included in evidence and that I was to be relieved of my stipulation with respect thereto, and that is why we are now taking the testimony of Mr. Davis and are about to take the testimony of Mr. Zeidenfeld. Am I correct, your Honor?

The Court: What other affidavits are there?

Mr. Paradise: The affidavits of Mr. H. H. Kelly and Mr. McGahan.

The Court: Did we inquire as to the availability of those men?

Mr. Paradise: I don't believe we did, if the court please, but I understand that both gentlemen are in court. I doubt if they are subject to draft.

The Court: I think we ascertained the age of at least Mr. Montgomery. I am not sure whether we inquired as to the other gentlemen or not. Mr. Kelly, what is your age?

Mr. Kelly: 51.

The Court: And are you married?

Mr. Kelly: Yes, sir.

The Court: And Mr. McGahan? [91]

Mr. McGahan: 45.

The Court: And are you married?

Mr. McGahan: Yes, sir.

Mr. Paradise: It was my understanding, if the court please, that the chief motive that prompted both the stipulation of counsel and the order of court in the introduction of both the affidavits and the depositions, the vari-

(Testimony of Harold E. Davis.)

ous depositions, was to expedite the matter in order that the matter might be properly disposed of and not spend so much time before the court in producing testimony. I think it is important that that purpose be adhered to at this time in view of the war situation and in view of the fact that this corporation is engaged largely in the war effort and I dislike to take their time from that purpose.

The Court: I gathered that our procedure with reference to the other affiants would be no different than that with reference to Mr. Davis. I don't know why we should make any distinction. Do you see any logical reason for making any distinction between the interrogation of the witness now on the stand and that of the other two affiants?

Mr. Krasne: Well, I just didn't want the record to have their affidavits of record. I don't see how much time is going to be saved. I don't know why I should stipulate a record for the other side. The affidavits are not that long. We have stipulated with respect to the lengthy depositions of our people, of the plaintiff's witnesses. I don't know [92] why the defendant should be permitted to try its case by affidavits. The people will be available. For instance, I don't know how much time will be saved by reason of the fact that an affidavit of Mr. Davis has been permitted to go in the record.

The Court: It was always understood that you would have the time that you did consume on cross-examination. There never was any doubt about that. But we have saved the time of the direct examination.

Mr. Krasne: I, naturally, will abide by the court's ruling. I just don't want to be deemed to have stipulated

(Testimony of Harold E. Davis.)

it and will ask to be relieved of my stipulation because of my understanding but, naturally, I will abide by the court's ruling.

The Court: I think the same procedure should be followed as to the other two affiants. Of course, that may mean that we will not reach the testimony of Mr. Zeidenfeld. I think we will have to keep in mind that, if we can't take his testimony, in the event of his inability to appear, his deposition will become available.

Mr. Krasne: Our understanding was we would finish with Mr. Davis, and Mr. Zeidenfeld is here, and that we would put him on the stand. That was our understanding yesterday.

The Court: Apparently it wasn't made clear, at least in my mind, that you were making any distinction between the witness now on the stand and any other person whose affidavit [93] has been filed. I don't see why we should make any distinction.

Mr. Krasne: I think I have been too argumentative, which I don't mean to be, but the reason yesterday was that there was some danger of this particular witness not being available. And we decided at this stage to do three things, first, to take his testimony. Then Mr. Zeidenfeld was available for the other side if they wanted to interrogate him, and he was to come on this morning. And they had some reason to take Mr. Montgomery's testimony.

The Court: Don't you see this risk? On the one hand, the deposition of Mr. Zeidenfeld has been taken and there has been some cross-examination of him during the course of that deposition. You haven't had the opportunity to cross-examine either Mr. Kelly or Mr. Mc-

(Testimony of Harold E. Davis.)

Gahan. In the event that these men are unable to appear at the trial, you may find yourself handicapped through failure to cross-examine them now but you have had the benefit at least of some measure of cross-examination of Mr. Zeidenfeld. So I think the order in which witnesses should be interrogated should be that, after Mr. Davis has concluded, then either Mr. Kelly or Mr. McGahan may be cross-examined.

Mr. Paradise: Would the court prefer that rather than to hear the testimony of Mr. Montgomery? Would the court prefer to postpone that? I was going to suggest to the court, upon the conclusion of Mr. Davis' testimony, that, because [94] Mr. Montgomery is engaged in some collective bargaining negotiations, he has arranged to be here this morning and for a part of this afternoon.

The Court: I think something was said about the fact that Mr. Montgomery might be required to be somewhere else.

Mr. Krasne: Yes. But, in view of your Honor's observation, which I think might have some benefit to us at the moment, there are no affidavits of Mr. Montgomery on file and I think the defendant can take its own chances as to whether they make his evidence available to the court. But, if we are to proceed with other witnesses than Mr. Zeidenfeld, I think we should avail ourselves of the opportunity to take Mr. Kelly's testimony, who has an affidavit on file, and cross-examine him, and the same with Mr. McGahan, and defer Mr. Montgomery.

Mr. Paradise: I really object to that procedure, if the court please. It is my understanding that the plaintiff must prove its case on its own complaint and we are be-

(Testimony of Harold E. Davis.)

ing forced to put our case on out of order, and I would like to put on the witnesses in the order in which they should appear.

The Court: That would create a problem. We may find ourselves occupied with the testimony of certain witnesses and yet not have the time presently to afford cross-examination of Mr. Kelly and Mr. McGahan. I don't think that the plaintiff ought to be put to that risk as long as you are going to have the benefit of their affidavits as evidence in [95] chief.

Mr. Paradise: Could the court indicate how much time we will have for the presentation of this matter, **that** is to say, will today's session conclude the matter?

The Court: I hope so.

Mr. Paradise: I mean to say, if the matter is not completed at the end of today's session, will the court permit more time at this time?

The Court: It looks like we will have to at least go far enough to permit the witnesses who are in the courtroom to conclude their testimony.

Mr. Paradise: That is to say, we can go on next week, is that correct?

The Court: Yes. But I am not certain about the date. I know it will not be Monday because that is a legal holiday and it will not be Tuesday because our law and motion calendar will be called Tuesday instead of Monday. It may be Wednesday.

Q. By Mr. Paradise: Mr. Davis, what instructions did you receive from Mr. Kelly at the time of the commencement of this transaction?



(Testimony of Harold E. Davis.)

A. He instructed me that the management desired to dispose of certain surface equipment facilities at the Cas-malia property and to contact the interested parties to find out what, if any, of that surface equipment was to be retained on the property.

Q. What is surface equipment, Mr. Davis? [96]

Mr. Sturzenacker: We object to that as calling for a conclusion of the witness.

The Court: Are you agreed as to what it means? If not, someone versed in this type of enterprise ought to be allowed to tell us.

Mr. Krasne: I think for the purpose of the record, so we won't have to interrupt constantly, we should like to interpose an objection to any such questions, this question and all similar questions, on the ground that they are incompetent, irrelevant and immaterial, it being parol evidence and tending to vary the terms of a written contract that does not contain the words "surface equipment," any such or similar words.

The Court: I think there may be some confusion here. This witness was interrogated about his conversations with his superior Mr. Kelly, which involved instructions preparatory to negotiating the sale which was ultimately made to the plaintiff. Now he is being asked to explain the particular term that he claims was used in fact in one of the conversations with the plaintiff's representatives. I don't think we are here concerned with the parol evidence rule. The objection is overruled. Is there any claim that this witness is not qualified to answer, in other words, that the foundation has not been laid to show that he knows what he is talking about and the meaning of the term "surface equipment"?

(Testimony of Harold E. Davis.)

Mr. Sturzenacker: Only, your Honor, his own remark on [97] cross-examination that he wasn't acquainted with the field and knew nothing about it; that he was a buyer of equipment and that was all. He has not been qualified as any kind of an expert to determine what surface equipment might consist of.

The Court: Do you want to lay the foundation by this witness or some other witness?

Mr. Paradise: I will do both, if the court please, because I would like to have the court have the benefit of this witness' understanding of the term.

Q. I believe you have testified that your duties as a buyer in the purchasing department also included the sale and disposal of salvage equipment, is that correct?

A. That is correct.

Q. In connection with transactions for the sale and disposal of salvage equipment, have you on occasion used the words "surface equipment"? A. Yes.

Q. On how many occasions would you say?

A. Oh, numerous times. Surface equipment is referred to—

Q. Before you answer that, is surface equipment a common and ordinary phrase in the oil industry?

A. Yes; it is.

Q. Do you know what it means?

A. It pertains generally to equipment and facilities [98] located on top of the ground and, to go further, pipelines, some of which might be buried a small amount underground.

Q. Are pipelines considered surface equipment in the oil industry? A. Yes; they are.

(Testimony of Harold E. Davis.)

Q. In the general use of that phrase?

A. Yes; they are.

Q. From what other types of equipment do you distinguish surface equipment, that is, from what other types of equipment in an oil field do you distinguish surface equipment?

A. May I have that question again, please?

Q. I will reframe the question. Perhaps it wasn't clear. Are there other types of equipment in an oil field which are not surface equipment? A. Yes.

Q. What are they?

A. There is subsurface equipment.

Q. Can you give us any illustrations of subsurface equipment?

A. Casing in the well, tubing, sucker rods and deep well pumps.

Q. What is the common and ordinary meaning in the oil well industry of subsurface equipment?

A. Equipment that is installed in a well more, I suppose you would say, in a vertical position in the ground.

Q. When you say installed, you mean installed in what [99] manner?

A. By running it in the hole.

Q. Does it make any difference whether the equipment which has been run into the hole has been cemented in place or fixed in any other manner?

A. Generally speaking, casing is cemented in the well.

Q. After you received your instructions from Mr. Kelly, did you have any discussions with Mr. Montgomery? A. Yes.

(Testimony of Harold E. Davis.)

Q. What was that discussion? Or, first, will you state when that occurred in relation to the day when you received your instructions from Mr. Kelly?

A. I think about the first time I talked to Mr. Montgomery was the latter part of September or the first part of October.

Q. Was that the telephone conversation to which you testified yesterday? A. Yes, sir.

Q. What did you tell Mr. Montgomery?

A. That we were making arrangements to dispose of certain surface equipment at Casmalia and asked him what exceptions there were or what items of equipment he wished to retain on the property.

Q. And Mr. Montgomery's reply was what?

A. Well, among—I will change that. There were six tanks that he wished to retain and a gas line to supply the [100] superintendent's house with fuel and a water line and the water tanks and water pump.

Q. Was there anything else that occurred at that conversation?

A. There were to be interconnecting lines which were also to be retained around the tanks.

Q. Was that the complete substance of the conversation or was there anything further?

A. It is my understanding at that time that the tanks were to be retained.

Q. Not as to your understanding, Mr. Davis, but merely as to what was said between you and Mr. Montgomery.

(Testimony of Harold E. Davis.)

A. At that time Mr. Montgomery told me that he wished the tanks retained in order that they would be available in the event the wells were ever reopened for production.

Mr. Krasne: When was this conversation?

Mr. Sturzenacker: May I have that answer, Mr. Reporter?

(Answer read by reporter.)

Q. By Mr. Paradise: Perhaps my question wasn't clear. I am still referring to this telephone conversation that took place rather than the subsequent conversation with Mr. Montgomery to which you testified yesterday.

A. Well, the conversation that you refer to, I presume, is the January 8th conversation.

Q. No. I was talking about your first conversation with Mr. Montgomery after you received your instructions from [101] Mr. Kelly. I will restate that. In your first conversation with Mr. Montgomery, did Mr. Montgomery state the reason why he wanted the tanks reserved or excluded from the sale?

A. I believe he did because it was always my understanding from the time that we first started—or it was my understanding after I had talked to him that that was the reason why they were being retained.

Mr. Krasne: We move that the last portion of the answer be stricken as not responsive.

The Court: The part about his understanding will go out beginning with the word "because".

(Testimony of Harold E. Davis.)

Q. By Mr. Paradise: I believe you testified yesterday that you had a subsequent discussion with Mr. Montgomery that occurred on January 8th, is that correct?

A. That is correct.

Q. As to which you have already testified.

At the court's request, I have produced the contract, dated March 12, 1940, between Richfield Oil Corporation and W. R. Anderson, doing business under the name of Petroleum Service Company.

The Court: Counsel have seen it, have they?

Mr. Paradise: Yes. May it be stipulated that this be offered in evidence?

Mr. Sturzenacker: So stipulated.

Mr. Paradise: I so offer this, your Honor, I believe it is Defendant's Exhibit No. 2. [102]

The Clerk: Do you wish them lettered?

The Court: Lettered; yes. The clerk calls attention to the fact that in one of the depositions there is a defendant's exhibit marked 1. That will have to be changed. To what deposition is that attached?

Mr. Paradise: That is the deposition of Mr. Zeidenfeld.

The Court: As long as the number is to be changed, we might just as well call this contract now Defendant's Exhibit A.

[DEFENDANT'S EXHIBIT NO. A.]

This Agreement, made and entered into this 12th day of March, 1940, by and between Richfield Oil Corporation, a Delaware corporation, hereinafter called "Richfield," having an office and place of business at 555 South Flower Street, Los Angeles, California, and W. R. Anderson, doing business under the firm name and style of Petroleum Service Company, hereinafter called "Contractor", having an office and place of business at Santa Maria, California,

Witnesseth:

That, Whereas, Richfield desires to engage the services of the Contractor to perform certain work upon the oil wells located on that certain parcel of real property in Santa Barbara County, California, more particularly described as follows:

Sections 18 and 19, Township 9 North, Range 34 West, S. B. B. & M.,

and to remove certain equipment hereinafter described therefrom and to clean up the premises and restore the same to their original condition all in the manner and subject to the terms and conditions hereinafter set forth,

Now, Therefore, in consideration of the premises and the mutual covenants and agreements hereinafter set forth, the parties hereto covenant and agree as follows:

1. Contractor shall furnish, supply and install, at Contractor's sole cost and expense, all labor, machinery, equipment, materials and supplies, including fuel, water and electricity necessary for the performance of Contractor's work and services hereunder.

(Defendant's Exhibit No. A)

2. All materials, equipment and appliances to be furnished, supplied, and installed by Contractor under the provisions of paragraph 1 hereinabove shall be subject to inspection and acceptance by the representative designated by Richfield and in the event of the rejection thereof or any portion thereof by said representative because of inadequacy or defectiveness, Contractor shall immediately and at its own cost and expense replace the same, which replacement shall be subject to the inspection and acceptance of Richfield's representative.

3. Contractor covenants and agrees that within five (5) days from date that notice is received from Richfield to start its operations, Contractor shall proceed diligently with the performance of the work in accordance with the provisions of this agreement. Contractor further covenants and agrees that all of said work shall be completed not later than ninety (90) days following the date of receipt of said notice.

4. Contractor agrees to perform the following work hereunder, which work is hereby defined to include generally the dismantling, removal, and disposition of all the wooden derricks located upon the land above described whether or not now standing; the cleaning out of all cellars, pits, and sumps, the filling of the same with dirt, and the leveling of the same to the natural surface of the contiguous land; the pulling of pumps, rods, and tubing from all the wells in which such equipment is present; the replacing of top flanges on all tubing heads; the plugging or capping of all tubing head outlets, excepting only one outlet on each well, which said outlet on each well shall be fitted by Contractor with valves in good condition; the removal from the premises of all pumps, rods and tubing



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and all junk and debris found in the vicinity of the well sites; and any and all acts and steps necessary or proper to accomplish the foregoing, all in accordance with good oil field practice and as designated by Richfield. All of said work shall be performed by Contractor to the satisfaction of Richfield and in accordance with the requirements of the County of Santa Barbara, State of California and of the Division of Oil and Gas of the State of California and of any other governmental authorities, and including, but without limiting the generality of the foregoing, the Fire Warden and the Fish and Game Commission. Without in any manner limiting the generality of the foregoing, Contractor shall perform the following specific work:

(a) Contractor shall dismantle and burn or otherwise remove from the premises all of the thirty-five (35) wooden derricks and foundations and appurtenances thereto, whether or not now standing, located upon the parcels of real property above described.

(b) Contractor shall clean out all the cellars, pits, and sumps at or near said thirty-five (35) wells and shall remove from said land above described and dispose of all oil, tar, waste mud, together with any other debris cleaned out of said cellars, pits, and sumps.

(c) Contractor shall fill up all the cellars, pits, and sumps with good dirt, and shall level off the fills to conform to the natural or graded surface of the contiguous land.

(d) Contractor shall pull from the following thirty-one (31) wells the pumps, rods and tubing listed in the following schedule:

(Defendant's Exhibit No. A)

Well No.	Tubing		approx.	960' 7/8" x approx.	Rods	950' 4" x 7'	Pump
1	4-3/4"	lapweld casing	-	"	1100' 7/8" x	4-3/4" x 5'	Axelson
2	4-3/4"	lapweld casing	-	"	1030' 7/8" x	4-3/4" x 7'	"
3	4-3/4"	lapweld casing	-	"	1040' 7/8" x	4" x 7'	"
4	4-3/4"	lapweld casing	-	"	950' 7/8" x	4" x 7'	"
5	4-3/4"	lapweld casing	-	"	950' 7/8" x	4" x 7'	D & B
6	4-3/4"	lapweld casing	-	"	940' 7/8" x	4" x 7'	"
7	4-3/4"	lapweld casing	-	"	950' 7/8" x	4" x 7'	Axelson
9	4-3/4"	lapweld casing	-	"	1050' 7/8" x	4" x 7'	D & B
10	4-3/4"	lapweld casing	-	"	1120' 7/8" x	4" x 7'	"
11	4-3/4"	lapweld casing	-	"	950' 7/8" x	4" x 7'	"
12	4-3/4"	lapweld casing	-	"	800' 7/8" x	4" x 7'	"
14	4-3/4"	lapweld casing	-	"	1020' 7/8" x	3" x 7'	"
15	3"	lapweld plain	-	"	815' 7/8" x	3" x 7'	"
22	3"	lapweld plain	-	"	650' 7/8" x	4" x 7'	"
23	4-3/4"	lapweld casing	-	"	620' 7/8" x	3" x 7'	"
29	3"	lapweld plain	-	"	800' 7/8" x	3" x 7'	"
30	3"	lapweld plain	-	"	550' 7/8" x	3" x 7'	"
31	3"	lapweld plain	-	"	630' 7/8" x	3" x 7'	Axelson
32	3"	lapweld plain	-	"	820' 7/8" x	4" x 7'	D & B
36	4-3/4"	lapweld casing	-	"	650' 7/8" x	4" x 7'	"
37	4-3/4"	lapweld casing	-	"	630' 7/8" x	4" x 7'	"
38	4-3/4"	lapweld casing	-	"	760' 7/8" x	4" x 7'	Axelson
39	4"	lapweld plain	-	"	700' 7/8" x	4" x 7'	D & B
40	5"	lapweld casing	-	"	1450' 7/8" x	4" x 7'	Axelson
41	4"	lapweld plain	-	"	960' 7/8" x	3" x 7'	"
42	3"	lapweld plain	-	"	710' 7/8" x	3" x 7'	"
44	3"	lapweld plain	-	"	500' 7/8" x	3" x 7'	"
47	3"	lapweld plain	-	"	1060' 7/8" x	4" x 7'	D & B
47	4"	lapweld casing	-	"	520' 7/8" x	4" x 7'	"
50	4-3/4"	lapweld casing	-	"	550' 7/8" x	4" x 7'	"
51	4-1/2"	lapweld casing	-	"			

(Defendant's Exhibit No. A)

Contractor shall remove from said land above described all pumps, rods and tubing so pulled from said wells as aforesaid; provided, however, that Contractor shall not pull from any of said wells or remove from said land any of said pumps, rods or tubing until after Contractor shall have completed all the work provided for in subparagraph (a) hereinabove; and provided further that Contractor shall store upon said land one-half ( $\frac{1}{2}$ ) of the tubing so pulled from each of said wells until Contractor has completed the performance of all of its duties, liabilities and obligations under this agreement; and provided further that Contractor shall not remove from said land such tubing so stored upon said land until payment by Contractor to Richfield of the purchase price therefor as provided in paragraph 15 hereinafter.

Contractor agrees that the work provided to be performed by him under the provisions of subparagraphs (b) and (c) hereinabove shall be performed by him on a well by well basis concurrently with the work to be performed by him under this subparagraph (d).

Contractor shall not remove from any wells any of the casing or liners now installed therein other than said tubing, rods and pumps above described.

(e) It is expressly understood and agreed that in connection with the work described under subparagraph (d) hereinabove Contractor shall not be required to engage in "fishing" for any of the pumps, rods and tubing in said wells which, prior to the com-

(Defendant's Exhibit No. A)

mencement by Contractor of such work, shall be stuck, frozen, parted or collapsed in the respective wells; provided, however, that in the event that any of said pumps, rods or tubing shall become stuck, frozen, parted or collapsed as a result of the performance of any of Contractor's work, Contractor shall, at its own cost and expense, perform any "fish-ing" operations necessary to remove the same. In the event that Contractor shall discover that any pumps, rods or tubing shall be stuck, frozen, parted or collapsed, as aforesaid, Contractor shall immediately report the same in writing to Richfield's representative.

(f) After Contractor shall have pulled the pumps, rods and tubing strings from said wells as provided in subparagraph (d), Contractor shall replace and securely attach the top flanges on the respective tubing heads of each of said wells and shall also attach a two (2) inch or larger gate valve in good condition to one tubing head outlet on each of said wells, and plug or cap securely all other tubing head outlets on each of said wells all in the manner designated by Richfield's representative.

(g) Contractor shall remove from the land above described any and all miscellaneous equipment of the nature of rig irons, sand reels, wire lines and similar equipment and any and all junk and debris located in the vicinity of any of said well locations.

(h) Contractor shall not move, damage, disturb or remove from the land any pipe lines, tanks, boilers,

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refinery equipment or any appurtenances thereto located upon said land above described.

(i) Contractor shall furnish to Richfield daily during the term hereof a written report specifying in detail and in the manner designated by Richfield's representative all work performed by Contractor under the provisions of this agreement, including a schedule of any and all materials removed from each well under the provisions of subparagraph (d) hereinabove and a schedule of all other equipment removed from the land under the provisions of subparagraph (g) hereinabove, which schedules shall describe in detail the nature, size and length of each item thereof.

(j) Upon completion of said work as above described Contractor shall remove from said land all of Contractor's tools, machinery, equipment and employees and shall leave the premises in a satisfactory, clean and uninjured condition.

5. Contractor shall notify Richfield's representative in advance to witness:

- (a) The burning of any wood or debris;
- (b) The capping of all tubing heads;
- (c) The cleaning out of all cellars, pits, and sumps, and the final condition of the same after filling, leveling and cleaning up;
- (d) All tubing, rods, pumps and equipment prior

## (Defendant's Exhibit No. A)

to their removal from the land above described under the provisions of subparagraphs (d) and (g) of paragraph 4 hereinabove.

6. Contractor agrees to protect the said land above described and all improvements and other equipment located thereon, and Richfield Oil Corporation against any and all claims of Contractor, laborers, mechanics and material men, and against all charges, liens and encumbrances of every kind and character arising out of or in connection with the performance by Contractor of any of Contractor's work or services hereunder, and to indemnify Richfield and its successors and assigns of **and** from any and all loss, cost, damage or expense arising out of or in connection with any such charge, lien or encumbrance.

7. Contractor covenants and agrees to indemnify **and** hold Richfield and its successors and assigns harmless of and free from any and all claims, liabilities, obligations, and causes of action of every kind and nature whatsoever for injury to or death of persons, including Richfield's employees, and/or damage to or destruction of property, including Richfield's property and property owned by any other persons, firms or corporations, **arising** out of or in connection with or resulting from any and all acts or omissions of Contractor or Contractor's employees in connection with the performance by Contractor of any of the work or services hereinabove provided for.

8. Contractor covenants and agrees further to place

(Defendant's Exhibit No. A)

in effect immediately and to maintain in effect at all times during the term hereof, at Contractor's sole cost and expense, the following insurance with responsible insurance carriers:

(a) Workmen's Compensation insurance covering all persons employed by Contractor in connection with the work and services to be performed under the provisions of this agreement;

(b) Public Liability insurance in amounts of not less than \$25,000.00 for injury to or death of one person and \$50,000.00 for injury to or death of more than one person in any one accident;

(c) Property Damage insurance in the stated amount of \$25,000.00 for any one accident;

(d) Automotive Public Liability insurance in amounts of not less than \$25,000.00 for injury to or death of one person and \$50,000.00 for injury to or death of more than one person in any one accident; and

(e) Automotive Property Damage insurance in the stated amount of \$5,000.00.

Such policies shall be written by insurance companies satisfactory to Richfield. Certificates issued by said insurance companies issuing said insurance policies shall be deposited with Richfield, which certificates shall provide that ten (10) days written notice shall be given to Richfield prior to any cancellation of or material change in any such policy.

(Defendant's Exhibit No. A)

9. Contractor agrees to indemnify Richfield and hold Richfield harmless from any and all loss, cost, damage, expense, liabilities, and cause of action arising in any manner out of or in connection with any suit, action or proceeding founded upon any claim that any equipment or machinery furnished or used by Contractor in the performance of the work hereunder infringes any patent or patent rights, either foreign or domestic.

10. Contractor, in performing the covenants and agreements of this agreement, shall act solely as an independent contractor and not as the servant or agent of Richfield in any respect, or for any purpose whatsoever.

11. This agreement shall be personal to the Contractor and shall not be assigned by said Contractor, either voluntarily or involuntarily by operation of law without first securing the written approval thereto by Richfield.

12. Contractor agrees that all of Contractor's employees engaged in the performance of work covered by this contract shall be paid wages not less than the wages currently paid by Richfield to similar classifications of labor, and Contractor agrees further that Contractor shall not require or permit any such employees to work longer hours than the hourly scale allowed by Richfield for similar classes of labor employed by Richfield.

13. Contractor agrees to and does hereby accept full and exclusive liability for the payment of any and all taxes and contributions levied or assessed against Rich-



(Defendant's Exhibit No. A)

field or Contractor for unemployment insurance and for old age retirement benefits, pensions, and annuities imposed by the government of the United States and by the government of any state of the United States which are measured by the wages, salaries, or other remuneration paid to persons employed by Contractor in connection with work Contractor is required to perform and have performed under the terms of this agreement.

14. Contractor hereby covenants and agrees to waive, and does hereby waive, any right to lien for services or labor, materials, supplies, equipment, apparatus, or other property performed or furnished under the provisions of this agreement to which Contractor might otherwise be entitled under the provisions of Title 4 of the California Code of Civil Procedure, or otherwise, and Contractor covenants and agrees further to require or secure from any subcontractor performing any portion of said work, the waiver of any such right to lien which might otherwise accrue to such subcontractor.

15. Upon completion by Contractor, strictly in the manner hereinabove provided, of all of Contractor's duties, liabilities and obligations hereunder, Richfield shall execute and deliver to Contractor a Bill of Sale covering all rods, pumps, tubing and other equipment permitted to be removed by Contractor from said real property under the provisions of paragraph 4 hereinabove. An inventory of such equipment prepared from the daily written reports submitted by Contractor under the provisions

(Defendant's Exhibit No. A)

of said paragraph 4 shall be attached as an exhibit to said Bill of Sale. It is expressly understood and agreed that Richfield makes no warranties whatsoever, either express or implied, with respect to the condition or fitness of any of said rods, pumps, tubing or other equipment nor does Richfield make any warranties whatsoever, either express or implied, that the rods, pumps or tubing listed in the schedule provided in subparagraph (d) of paragraph 4 are either now located or present in said wells or that the same are in condition to be removed therefrom by Contractor.

It is expressly understood and agreed that Contractor shall not be entitled to receive payment from Richfield for the performance of any of Contractor's services hereunder and that the execution and delivery by Richfield of said Bill of Sale, as aforesaid, shall constitute full compensation to Contractor for its services. Contractor expressly covenants and agrees to pay to Richfield, concurrently with the delivery of said Bill of Sale, a sum of money equal to 2¢ per foot for all tubing (including casing used as tubing) removed by Contractor from said real property under the provisions of paragraph 4 hereinabove. In addition Contractor shall pay to Richfield the amount of any and all taxes levied or assessed by any Governmental authority in connection with the sale or removal of said rods, pumps, tubing and equipment as above provided, expressly including, but without limiting the generality of the foregoing, the amount of the California Retail Sales Tax applicable thereto; provided,

(Defendant's Exhibit No. A)

however, that in the event that Contractor shall purchase the same for resale Contractor shall execute and deliver to Richfield a certificate of resale in the form prescribed by the California Retail Sales Tax Act and by the Regulations applicable thereto.

16. In the event that Contractor shall be judicially declared bankrupt or insolvent or file a voluntary petition in bankruptcy, or make an assignment for benefit of its creditors, or in the event that Contractor shall at any time refuse or neglect to supply a sufficient number of properly skilled workmen, except in case of strikes or lockouts, or in the event that Contractor shall commit breach or default of any of its duties, liabilities or obligations hereunder and failure to cure or remedy such breach within forty-eight (48) hours after written notice thereof by Richfield to Contractor, Richfield, at its option, but without any obligations so to do, may terminate Contractor's employment, and all costs and expenses incurred by Richfield in completing said work and any and all damages which Richfield shall suffer as a result of any such event or breach or default shall be paid by Contractor to Richfield upon demand therefor. In the event of any such termination of this agreement Contractor shall not be entitled to receive a Bill of Sale from Richfield covering said rods, pumps, tubing and other equipment as provided in paragraph 15 hereinabove, and Contractor shall redeliver to Richfield on said land described hereinabove any and all rods, pumps, tubing and other equipment

(Defendant's Exhibit No. A)

theretofore removed from said real property by Contractor.

17. Neither party hereto shall be liable for any delay due to, occasioned or caused by ordinary wear, fire, earthquake, explosion, flood, hurricane, the elements, act of God or of the public enemy, action of Governmental authorities or agents, war, invasion, insurrection, riots, strikes or lockouts, or any other cause, whether similar or dissimilar to the foregoing, beyond the control of such party, and any delay due to said causes, or any of them, shall not be deemed a breach of or a failure to perform this agreement.

18. Subject to the provisions of paragraph 11 hereinabove, this agreement shall enure to the benefit of and be binding upon the successors and assigns of the parties hereto.

In Witness Whereof, the parties hereto have executed this agreement the day and year first hereinabove written.

RICHFIELD OIL CORPORATION

By H. H. Kelly

Attest .....

W. R. Anderson

W. R. ANDERSON,

doing business under the firm  
name and style of PETROLEUM  
SERVICE COMPANY

[Stamped]: Deft's Ex. No. A. Filed 9/4/42.

(Testimony of Harold E. Davis.)

Q. By Mr. Paradise: Showing you Defendant's Exhibit A, Mr. Davis, are you familiar with this contract?

A. Yes, sir.

Q. Paragraph 4 of this contract provides, in part, as follows: "Contractor agrees to perform the following work hereunder," and then omissions; "the pulling of pumps, rods, and tubing, from all the wells in which such equipment is present; the replacing of top flanges on all tubing heads." And paragraph 4(d) of the contract provides as follows: "Contractor shall not remove from any wells any of the casing or liners now installed therein other than said tubing, rods and pumps above described." Would you state to the court the difference between casing or liners on the one hand and tubing, rods and pumps on the other? A. Tubing is—

Q. Do you know the difference, Mr. Davis?

A. Yes, sir. Casing is ordinarily cemented in a hole [103] and referred to at times as the protective string. Tubing is generally used to produce the well through the tubing, that is, to bring the oil up through the tubing.

Q. Mr. Davis, I call your attention to paragraph 4(e) of this contract and ask that you read the same. Will you read it aloud?

A. "It is expressly understood and agreed that in connection with the work described under sub-paragraph (d) hereinabove, contractor shall not be required to engage in 'fishing' for any of the pumps, rods and tubing in said wells which, prior to the commencement by contractor of such work, shall be stuck, frozen, parted or collapsed in the respective wells; provided, however, that in the event that any of said pumps, rods or tubing shall

(Testimony of Harold E. Davis.)

become stuck, frozen, parted or collapsed as a result of the performance of any of contractor's work, contractor shall, at its own cost and expense, perform any 'fishing' operations necessary to remove the same. In the event that contractor shall discover that any pumps, rods or tubing shall be stuck, frozen, parted or collapsed, as aforesaid, contractor shall immediately report the same in writing to Richfield's representative."

Q. Did you conduct the negotiations for the execution of this contract?     A. Yes, sir.

Q. Did you get instructions from any of the departments of the Richfield Oil Corporation for the making of such [104] contract?     A. Yes, sir.

Q. From which department did your instructions come?     A. The production department.

Q. Did the production department instruct you concerning the inclusion in the contract of the paragraph you just read?     A. Yes, sir.

Q. Will you call attention in the contract to what provision you had in mind when you testified yesterday that the contractor was not required to pull all of the tubing from the wells on the property?

A. That portion of the contract which states, "It is expressly understood and agreed that in connection with the work described under sub-paragraph (d) hereinabove, contractor shall not be required—"

Q. Is that the one you just read?

A. Yes; that is right.

Q. Is there any other provision of the contract to which you had reference?     A. Not that I know of.

(Testimony of Harold E. Davis.)

Q. Calling your attention, Mr. Davis, to Plaintiff's Exhibit No. 4, which is the contract between Richfield and Aaron Ferer & Sons, and to the map attached thereto as Exhibit A, will you point out to the court on this map any gas lines extending from the other gas line to which reference was made by the legend on the map, which reads, "And any [105] extensions of gas line necessary to furnish gas to Duncan's house"?

A. On this map you will note that this line is a 2-inch gas line.

Q. Are you referring now to the line in red that leads up to Well No. 36?

A. Well No. 36. This line also extends on in this direction.

The Court: That is, to the lower end of the map?

A. That is right.

Q. By Mr. Paradise: That is in an easterly direction, is it not?

A. In an easterly direction and then runs north to Well No. 44 and it is indicated on this map that there is a connection there.

Mr. Krasne: For the purpose of the record, the line that the witness is now indicating is in red, is that correct?

A. That is right. We stopped here and put in this stipulation or this provision, rather.

Q. By Mr. Paradise: Which provision?

A. That states, "And any extensions of gas line necessary to furnish gas to Duncan's house."

(Testimony of Harold E. Davis.)

Q. Does the same line extend beyond?

A. This line extends on beyond Well No. 44 and apparently is split up in two lines and it goes on to Well No. 46. This is the same 2-inch gas line extending on here [106] and from there it goes up to a boiler house apparently.

Mr. Paradise: That is all.

Recross-Examination.

Q. By Mr. Sturzenacker: Mr. Davis, when did Mr. Montgomery tell you or anybody tell you to exclude these gas lines or this gas line running to Mr. Duncan's house?

A. He first told me in our conversation which occurred sometime during the latter part of September or the first of October.

Q. You read Mr. Ferer's offer of December 2nd that has been introduced here as Plaintiff's Exhibit No. 2?

A. Yes, sir.

Q. Nothing was said in there about reserving the gas line, was there?      A. I don't remember.

Q. Look at it.      A. That is right.

Q. You had a telephone conversation with Mr. Ferer about the 2nd of January, which is the same date, for your recollection, that you wrote the letter Plaintiff's Exhibit No. 3. Did you speak to him at that time about reserving the gas line?      A. I don't know.

Q. I show you Plaintiff's Exhibit No. 3 and ask you if you said anything in there about reserving the gas line. [107]      A. Apparently not.



(Testimony of Harold E. Davis.)

Q. On the 8th of January, when Mr. Ferer and Mr. Clements came to your office and gave you the check for \$22,000, did you have any conversation with them at that time about reserving the gas line?

A. I may have. I don't remember.

Q. You wrote a memorandum when they were there at that time, did you? A. That is right.

Q. Will you look at that, Plaintiff's Exhibit No. 1, and tell me if there is anything on there that says anything about reserving the gas line? A. No, sir.

Q. Isn't it a matter of fact that the first time you heard anything about reserving that gas line was after you had accepted Mr. Ferer's bid and received his money?

A. No; I don't think it is.

Q. But you never discussed with Mr. Ferer or anybody connected with his organization the question of reserving that gas line?

A. Mr. Ferer got most of his information on which he based his bid from Mr. McGahan.

Mr. Sturzenacker: I move that answer be stricken as not responsive and a conclusion of the witness.

The Court: It may go out.

Mr. Sturzenacker: Will you read the question to the [108] witness?

(Question read by reporter.)

A. Not that I recall.

Q. You testified this morning that in your first conversation with Mr. Kelly he told you to make arrangements or to start to make arrangements to sell the surface equipment of the Casmalia lease, is that right?

A. That is correct.

(Testimony of Harold E. Davis.)

Q. And that was sometime in August or September, 1940?      A. That is correct.

Q. Now, again, I ask you this. You read the communication of Mr. Ferer which was received in your office on the 11th of December, the bid, did you not?

A. Yes, sir.

The Court: Will you give us the exhibit number?

Mr. Sturzenacker: Exhibit No. 2.

Q. Is there anything you recall in this document that says anything about purchasing the surface equipment on the Casmalia property?      A. No; there isn't.

Q. As a matter of fact, it says the refining and producing property, does it not?

A. I believe it does. I don't remember the words.

Q. And is there anything in your acceptance of the 2nd which—I will withdraw that question. Did you say anything in your telephone conversation with Mr. Ferer on the [109] 2nd of January about Mr. Ferer only purchasing the surface equipment on the Casmalia property?

A. I don't believe I did.

Q. And is there anything in your Exhibit No. 3, which is the letter of the 2nd of January, that says anything about Mr. Ferer purchasing only the surface equipment?      A. No.

Q. And is there anything in your note or memorandum of the 8th day of January, Plaintiff's Exhibit No. 1, that says anything about just purchasing the surface equipment?

Mr. Paradise: If the court please, I object to this line of questions and move to strike the answers to them on the ground that it is either calling for a conclusion of

(Testimony of Harold E. Davis.)

the witness as to what the document means or else the instrument speaks for itself. If Mr. Sturzenacker is merely trying to bring out the fact that none of those three exhibits he is questioning the witness about uses the words "surface" or "surface equipment", I will willingly so stipulate but to ask the witness the questions which he has is calling for the conclusion of the witness as to the meaning of that particular document.

The Court: I think the fair meaning of the testimony and all counsel really means is that the term "surface equipment" is not used in any of the exhibits referred to and that that is all the witness means by his testimony.

Mr. Paradise: Yes. [110]

Mr. Sturzenacker: That is satisfactory.

Q. Mr. Davis, as I recall your testimony, and correct me if I am mistaken, on the 8th, Mr. Clements and Mr. Ferer came to your office in response to the letter which you had written on the 2nd, telling them to come in within 10 days with a check for \$22,000 and to deliver the check to you, and you made up this memorandum, and then some conversation was had between you and Mr. Clements relative to the sale by Richfield and the purchase by Ferer of some of the excepted property, to-wit, the tanks, is that right? A. That is right.

Q. And it was at that time you called Mr. Montgomery? A. That is right.

Q. And at that time that you talked about those tanks the check had been delivered and your memorandum had been delivered to Mr. Ferrer?

A. Which memorandum is that?

(Testimony of Harold E. Davis.)

Q. The memorandum of January 8th, which is just a receipt for the sale of the material and equipment of the Casmalia, Exhibit No. 1.

The Court: Do I understand the question is did the conversation between the witness and Mr. Montgomery over the telephone, in the presence of Mr. Ferer and Mr. Clements, take place after this receipt had been given to those gentlemen? Is that the question?

Mr. Sturzenacker: That is the question. [111]

A. Would you term this a receipt?

Q. Well, a document. I will withdraw the word "receipt" and let's call it a document rather than a receipt. It is not a receipt.

The Court: What is the exhibit number?

Mr. Sturzenacker: Exhibit No. 1.

A. There has been so much confusion, may I have the question again, please?

Q. Yes.

(Question read by reporter.)

Q. The word "receipt" is withdrawn and the words "Exhibit No. 1" are to be used.

A. The conversation took place before this Exhibit No. 1 was drawn up.

Q. And before or after the check was delivered by Mr. Ferer?

A. Well, during the meeting. I think their main purpose or primary purpose in coming in there was to deliver the check and it was during that particular time we discussed these various things and eventually wrote up this Exhibit No. 1.

(Testimony of Harold E. Davis.)

Q. In other words, the reason for their visit there was to comply with your letter of January 2nd—I speak of it as your letter, although it is signed by Mr. Kelly—to come in with a check? A. Yes, sir. [112]

Mr. Paradise: May I have that last answer, please?  
(Answer read by reporter.)

The Court: Read the question and the answer.  
(Record read by reporter.)

Q. By Mr. Sturzenacker: Mr. Davis, you are familiar with what is necessary to produce oil wells, aren't you? A. To a certain extent; yes.

Q. And you are familiar with this Anderson contract?  
A. Yes, sir.

Q. Is it true that you can produce oil wells without the use of tubes or sucker rods, that is, that you can produce the oil wells in that field that were drilled there without the use of sucker rods or tubes?

Mr. Paradise: I object to that question on the ground there is no proper foundation. Mr. Davis has testified that he is a buyer and, while he is familiar with the equipment in an oil well, he has not been qualified as an expert on the production of oil from wells.

The Court: I am inclined to think there is merit in that criticism. Perhaps both sides can agree. Is there any mystery about this?

Mr. Paradise: Certainly, none. Mr. Montgomery will be the next witness, if the court please, and he can testify in detail about the production.

Mr. Krasne: I think this line of interrogation goes to the credibility of this witness, your Honor. [113]

(Testimony of Harold E. Davis.)

Mr. Sturzenacker: That is right, your Honor.

Mr. Krasne: The witness has testified that he had certain beliefs and understandings about what was to be sold and what wasn't and that these wells were to be reopened, and I think it is perfectly proper to find out from him if he didn't know, as a matter of fact, that he had already sold things out of the wells that would be essential and indispensable to the operation of the wells. I think it definitely goes to his credibility.

The Court: I think the question is still open to the criticism as to whether or not the witness has shown himself qualified as to what is essential to produce oil from a well.

Mr. Sturzenacker: All right, your Honor.

Q. Mr. Davis, do you know whether it is necessary to have a derrick on wells, such as were located on the Casmalia property, in order to produce oil from the wells?

A. It is not always necessary.

Q. Do you know of any well in that territory being produced without the use of a derrick?

A. I am not familiar with the entire field.

Q. This contract provides—you read certain portions of it and I am calling your attention to page 3 and to the paragraph designated as paragraph (a). You are familiar with that clause, are you?

A. Yes, sir.

Q. And under that clause he was to dismantle all of the [114] derricks, was he not?

A. That is correct.

(Testimony of Harold E. Davis.)

Q. And he was to take it away and burn up all of the wood and refuse resulting from that?

A. That is correct.

Q. And under paragraph (b) he was to clean out all of the cellars, pits, and sumps, and dispose of all the oil, tar and waste, wasn't he? A. That is correct.

Q. And he was to fill up all of the cellars, pits, and sumps, was he not, under this contract?

A. That is correct.

Q. And you required him under this contract to leave the tubing and the sucker rods on the property until such time as he had completed this work, didn't you?

A. That is right.

Q. Were your instructions from Mr. Montgomery in the producing department that you were doing this for the purpose of getting the wells ready to produce?

A. I didn't question the reasons why they were removing the tubing and sucker rods.

Q. Did the production department tell you to have the tubing and the sucker rods removed, the derricks pulled down, the cellars and pits filled up and the sumps cleaned out and filled? Is that correct?

A. That is correct. [115]

Q. There was nothing up to this time, up to the time of the Anderson contract, Defendant's Exhibit A, where your department had sold anything off of the premises, was there?

A. I don't know. I can't answer that question.

(Testimony of Harold E. Davis.)

Q. Well, in connection with the producing equipment there, had you sold anything off?

A. It is still impossible for me to answer.

Q. Did you know it was necessary to use pumps to extract the oil from the ground in this field?

Mr. Paradise: I object to the question, if the court please, on the ground this witness has not as yet been qualified as an expert on the production.

The Court: As to that question, I think he can very well disclose whether or not he is sufficiently informed. If he answers one way, it will indicate he claims to be informed and, if he answers otherwise, it will indicate he doesn't know.

Mr. Paradise: Perhaps I misunderstood the question but I thought it assumed—

Mr. Sturzenacker: I asked him if he knew.

Mr. Paradise: To make the objection clear, if the court please, I think there is a lack of foundation because as the court knows, oil fields are entirely different, that is to say, one oil field may not be representative of another. These particular wells, as is already in evidence, were drilled from 1916 to 1922 and 1923 and the manner of [116] production of wells drilled under an entirely different method, that is to say, cable tool wells, as these wells were drilled and as appears in the affidavit, might be different and might produce in a manner entirely differently. And, unless this witness has been qualified as to those matters, I can't see that he can testify as to these particular things.

The Court: May we have the pending question read?

(Question read by reporter.)



(Testimony of Harold E. Davis.)

The Court: I think he may answer whether he has knowledge of the subject. If he has no knowledge, that will end the matter.

A. The only knowledge I have would be an indication that there were pumps and sucker rods and tubing in the wells. Other than that, I would have no working knowledge of the field.

Q. By Mr. Sturzenacker: In other words, the fact that your inventory showed that there were tubes and sucker rods and pumps in the wells would indicate to you they were necessary in order to produce those wells?

A. I would assume that.

Q. In this conversation on the 8th of January, when Mr. Ferer and Mr. Clements were present in your office and you had this telephonic conversation with Mr. Montgomery, did Mr. Montgomery say that he wanted to keep the tanks there for storage in the event they reopened the field?

A. In the event they reopen the wells for production. [117]

Q. That they reopened the wells?

A. That is right.

Q. From that you drew the conclusion it was from the wells that were already drilled on the property, did you?

A. That is correct.

Q. You knew there were pipelines running from the wells to certain storage tanks, did you not?

A. Yes, sir.

(Testimony of Harold E. Davis.)

Q. And you meant in this sale to include those pipelines running from those various wells to production tanks, did you not?      A. That is right.

Q. Mr. Montgomery didn't tell you to reserve those pipelines from those wells to tanks, did he?      A. No.

Mr. Paradise: To which tanks?

Mr. Sturzenacker: The storage tanks.

Mr. Paradise: Do you mean the six excluded tanks?

Mr. Sturzenacker: No; any storage tanks.

Q. You are familiar with the rest of the bids that have been received by your company, are you not?

A. Yes, sir.

Q. Mr. Paradise has produced a group of bids and I understand a great many of these bids are bidding on just particular articles, is that right?

A. That is correct. [118]

Q. And that there are only approximately three bids that were bidding on the whole equipment, is that right?

A. I don't know how many there were; three or four.

Q. Mr. Paradise just handed me a group of them and I will show you one of the Western Oil Fields Supply Company and one of R. Levinson and one of Dulien Steel Products, Inc., and ask you to examine those bids and tell me if those were three that were received by you for the purchase of the equipment at Casmalia.

A. Yes, sir.

Q. Do you know or now remember of any other bids that were received for the purchase of all the equipment at Casmalia or the equipment you were offering at Casmalia?

(Testimony of Harold E. Davis.)

Mr. Paradise: That assumes a fact not in evidence, does it not? Are you placing any interpretation by that question on these three particular ones?

Mr. Sturzenacker: No.

Q. For your information, I have glanced through these bids Mr. Paradise has handed me and I do not find any that apparently bid on all of the property. One bids on the warehouses and so forth.

A. Yes. May I have that question again, please?

Mr. Sturzenacker: Will you read it?

(Question read by reporter.)

A. No.

Q. Calling your attention to the first one that you have [119] in your hand, which is a handwritten letter addressed to Richfield Oil Corporation, dated November 22, 1940 and signed R. Levinson, I will ask you, refreshing your memory from that, what was his bid?

Mr. Paradise: Before the witness testifies as to the contents of the document, are you offering these in evidence?

Mr. Sturzenacker: They are your files. I don't know whether I should offer them or not, Mr. Paradise. I was merely asking the witness to refresh his memory from these bids rather than to clutter up the record. I don't think it will be necessary to clutter up the record with these bids. He said yesterday he couldn't recall because they were in writing.

Mr. Paradise: I will object to any oral testimony concerning the bids and also object to the introduction of the bids in evidence, if the court please.

Mr. Sturzenacker: I will withdraw the question.

(Testimony of Harold E. Davis.)

Q. Will you glance through these three bids which you have in your hand and, from glancing through these and reading them through, would you now be able to answer a question as to what was the amount of other bids received from other people for the purchase of the equipment at Casmalia?

Mr. Paradise: I will object to that on the same ground, if the court please. It is asking for the contents of a written instrument. The plaintiff is not offering the [120] instrument before the court. If he were, I would object on various grounds, including the immateriality of the bids as a part of this issue between the plaintiff and the defendant.

The Court: Assuming that the plaintiff were to offer the contents of some of the bids, upon what theory would you present the evidence?

Mr. Sturzenacker: The only theory is that, these bids being half the amount of the bid of Ferer & Sons, it should have indicated to this witness, who was accepting this bid, that, when Ferer & Sons bid \$22,000 as against bids of \$12,000 and \$7,000 from other people, there was some difference in the property which the purchasers in the various instances wished to acquire.

The Court: Do I understand that among the bids to which you are now referring, which are not yet in evidence, two different bidders offered, respectively, \$7,000 and \$12,000 for the identical property?

Mr. Sturzenacker: That is correct.

Mr. Paradise: I must object to that—

(Testimony of Harold E. Davis.)

The Court: Do you think that the argument about the discrepancy in the figures is equally applicable to the two bids for \$7,000 and \$12,000, respectively? In other words, where will it lead us?

Mr. Sturzenacker: It leads to this, your Honor. Mr. Davis has indicated that he discussed with Mr. Clements, associated with the plaintiff in this action, the purchase of [121] this equipment; that he also communicated to Mr. McGahan, of Long Beach, the fact that this equipment was for sale. The affidavit of Mr. McGahan and the depositions taken by the defendant indicate that in their defense of reformation of the contract they will attempt to show that McGahan furnished Aaron Ferer, the plaintiff in this action, with certain information about certain equipment that was to be sold. It will be our contention that we received our information from Mr. Davis. Mr. Davis says he didn't discuss this sale with other people except Mr. Clements and Mr. McGahan, their own agent. It is our contention that our information came from Mr. Davis. We bid on the equipment that Mr. Davis said was for sale and we bid on that alone and in doing so we offered \$22,000, whereas the rest of the bids came in from people who had gotten their information from Mr. McGahan, which bids called for \$12,750, \$12,500 and so forth. Well, this other bid was not for \$7,100. I notice that they had an additional bid besides that of \$1,250, making \$8,350 all together. I didn't note that they had made a separate bid for 37 boilers. That is the reason for this testimony. It should not come until the

(Testimony of Harold E. Davis.)

defendant's case comes along but we are taking this witness' testimony in order to perpetuate it and out of order and, therefore, that is the reason for asking these questions.

Mr. Krasne: I should like to add one more word, if I may, with respect to why this line of evidence should be [122] admissible. After all, at least in so far as the reformation of contract phase of this litigation is concerned, we are in equity. The charge is made that a mistake has been made by the defendant and that the plaintiff knew of that mistake or should have known of it. I say to your Honor that the shoe is on the other foot. If when this witness, who receives bids, receives a bid that does not seem to be ambiguous on its face, calling for the purchase of everything, and when that bidder, the plaintiff in this action, offers \$22,000, and when this witness testifies that he had something else in mind, I think, when he realized that the plaintiff was bidding \$10,000 more, or a \$22,000 bid, than the next highest bidder, there should have been a duty upon him to sit down with Mr. Ferer and say, "I wonder if you are not bidding for more than we intend to sell." The discrepancy in figures in the bids was so great that this witness or Richfield should themselves have done something to have tried to correct the mistake. It should have been obvious to him. And I think it is admissible for that purpose.

Mr. Paradise: If the court please, I believe this would be the most highly speculative and conjectural type of evidence to be received on an inquiry of this sort. Assuming these particular bids were offered in evidence, it would be perfectly proper, I presume, for the defendant to bring

(Testimony of Harold E. Davis.)

into court each one of our bidders and find out what he had in mind in arriving at that particular amount. The amount [123] involved, I presume, is determined by each bidder based upon his own circumstances, that is to say, that he is buying salvage equipment for resale. If one particular bidder has an available market for the product and another one does not, the one who has the market will bid more. And if one expects higher costs, he will bid less than another one. None of those matters enter into the good faith of the defendant. Obviously, I will acknowledge and offer to stipulate that Richfield Oil Corporation accepted the highest bid and I doubt if counsel for the plaintiff would expect the Corporation to do otherwise. However, I can't see any possible merit in putting in these other offers before the court for the reason it would raise various collateral matters and they are too speculative and conjectural to have any probative value whatsoever and are entirely immaterial in determining the intention of this defendant or of the plaintiff as to what was covered. The bids themselves don't show on their faces whether the same property was covered or I mean whether the particular things were covered or whether it was others. And, to make the point clearer, there will be before this court, if this case ever gets to the point of proof of damages, the question of the costs of abandonment of oil wells and the question of the comparison of the costs of abandonment with the recoverable value of the casing. It has been the position of this defendant throughout this entire proceeding that the cost of abandonment is greatly in excess of the recoverable value. [124] If any of these particular bidders who have

(Testimony of Harold E. Davis.)

bid \$8,000 and \$12,000 were familiar with the costs of abandonment of oil wells, that itself might have entered into the question as to what they bid, in other words, the costs of the work involved as compared with their expectation of over-all recovery. For that reason I say that the bids are both speculative and conjectural and entirely immaterial.

The Court : Are you offering certain particular bids?

Mr. Sturzenacker: The question is really, as I stated to the witness, after reading these bids over, can he refresh his memory, which he couldn't do yesterday, as to the amount of these respective bids.

The Court: I think the objection is well taken so far as it undertakes to go into the contents of written instruments. And that brings us back to whether or not you are proposing to offer in evidence the written documents.

Mr. Sturzenacker: Your Honor, at this time we will offer these three documents as one exhibit.

The Clerk: Plaintiff's Exhibit No. 5.

Mr. Paradise: The same objection.

The Court: Let me see them. They may be marked for identification and the objection is sustained. They may be marked for identification only.

Q. By Mr. Sturzenacker: Mr. Davis, at this time can you tell me what the next highest lump sum bid as received by Richfield for this property was? [125]

Mr. Paradise: I object to the question on the same grounds already stated and on the further ground of lack of proper foundation.

The Court: Sustained.



(Testimony of Harold E. Davis.)

Q. By Mr. Sturzenacker: Do you know, as a matter of fact, the next highest bid received was \$12,750?

Mr. Paradise: The same objection.

The Court: Sustained.

Q. By Mr. Sturzenacker: Do you know of any other bid that was received by Richfield, except the Aaron Ferer bid, higher than \$12,500?

Mr. Paradise: The same objection.

The Court: Sustained.

Mr. Krasne: Will counsel stipulate that these three particular bids which have been introduced for identification were taken from a group of bids that counsel produced? And will counsel stipulate that the three which have so been introduced for identification represent the highest bids, lump bids or the only lump bids, that were made?

Mr. Paradise: Perhaps I haven't made my objection clear. I won't stipulate to anything concerning the contents of the documents. I will stipulate to the fact that Richfield accepted the highest bid that was offered but whether the offers were on the same basis or on different bases, there is nothing before the court as to that.

Q. By Mr. Sturzenacker: Have you any way of determining [126] mining what the next highest bid was except by the use of the bids which I handed you a few moments ago?

A. No.

Q. Mr. Davis, you commented a little while ago on a conversation that you had with Mr. Montgomery relative to these tanks and you placed that conversation as of the 8th day of January, at the time Mr. Ferer and Mr.

(Testimony of Harold E. Davis.)

Clements came to your office and delivered the check for the \$22,000. Refreshing your memory, did you afterwards have a conversation with Mr. Ferer and Mr. Clements, in the office of Mr. Paradise, at the time the formal contract was written?      A. About the tanks?

Q. Did you actually have a conversation about anything?      A. Oh, yes.

Q. And isn't it a fact that at that time you picked up the telephone and called Mr. Montgomery and asked him if he wanted to sell those six storage tanks on the Cas-malia property?

A. Not in Mr. Paradise's office.

Q. You didn't have that conversation in Mr. Paradise's office?      A. Not that I recall.

Q. At the completion of the handing of this note or memorandum Exhibit No. 1 to Mr. Ferer and Mr. Clements, did you have any further conversation with them?

A. In my office or Mr. Paradise's office? [127]

Q. In your office, on that date.      A. I think not.

Q. As a matter of fact, didn't you call Mr. Paradise and ask him about reducing this to a formal contract and he told you that he was tied up or something of the kind, and you told these gentlemen they would have to come back again, at which time Mr. Paradise could reduce this to a formal contract?

A. I thought we went up to Mr. Paradise's office right away.

Q. You what?

A. I thought we went up to Mr. Paradise's office right away.

(Testimony of Harold E. Davis.)

Q. You went up to Mr. Paradise's office with them on the same day? A. That is correct.

Q. And did you have a conversation with Mr. Paradise and the gentlemen there? A. That is right.

Q. And what was said at that conversation? This is still on the 8th.

A. We merely discussed the formulation of the contract.

Q. And did Mr. Paradise make any notes or record of it? A. I presume he did.

Q. Did you hand him the offer at that time?

A. What offer was that? [128]

Q. The offer of Mr. Ferer, heretofore introduced as Exhibit No. 2, the offer of Ferer & Sons to purchase this for \$22,000, on the 10th day of December.

A. I don't think I showed Mr. Paradise that offer.

Q. Did you show him a copy of your memorandum that you had handed to Mr. Clements and Mr. Ferer that day? A. Yes, sir.

Q. And did you say anything to Mr. Paradise about drawing a contract between Ferer and the Richfield Company about selling this property? A. Yes.

Q. Did you tell Mr. Paradise about excluding various things from the contract?

A. I believe that was covered in Exhibit 1.

Q. And did you tell Mr. Paradise that Richfield was selling to Mr. Ferer everything except those excluded items?

A. I don't remember just how that thing was worded. That was just a general outline of the proposed contract.

(Testimony of Harold E. Davis.)

Q. Did you tell him that you were selling, subject to the exceptions noted in the memorandum, all the equipment and facilities now located on the land described, the Casmalia property?

A. May I see that exhibit and I can answer the question?

The Court: For the purpose of the record, will you indicate what the witness is examining?

Mr. Sturzenacker: Exhibit No. 1. [129]

A. Now, may I have the question again?

Mr. Sturzenacker: Will you read the question to the witness?

(Question read by reporter.)

A. It is covered in this exhibit.

Mr. Krasne: I want to interrupt. I think the record should show that there are signals going on between this witness and Mr. Kelly that I see. And, if they continue, I shall have to ask the court to exclude all witnesses from this courtroom.

The Court: Now, that is a very serious charge, Mr. Krasne. I think you should amplify that statement in fairness not only to yourself but to the witness on the stand and to Mr. Kelly, the gentleman referred to.

Mr. Krasne: I will state to the court, and I will state it under oath, that, while this witness was hesitating in replying to this question, I saw Mr. Kelly go like this to him. Now, I think that I owe it to my client and to the court to call that to the court's attention. I don't say that I am infallible in my observations and I may be in error but that is what I saw, and I owe it to my client to call it to the court's attention.

(Testimony of Harold E. Davis.)

The Court: I will ask Mr. Kelly to step forward. You just heard the statement made by one of plaintiff's counsel. What have you to say?

Mr. Kelly: I absolutely deny it, definitely. [130]

The Court: And, Mr. Davis, what have you to say?

A. I wasn't even looking at him.

The Court: Do you wish to go any further in the matter, Mr. Krasne?

Mr. Krasne: Your Honor, I think I have done my duty. I have called the court's attention to it and, if I am in error, I will apologize. But I think Mr. Kelly should be very careful about making any gestures that might be misconstrued or misinterpreted. I certainly didn't make that statement to the court to try to make an impression. There is no jury here. I saw it and what I saw I reported to the court.

The Court: Do you recall making any motions that you intended to be conveyed to anybody in the courtroom?

Mr. Kelly: Definitely not.

The Court: For the present, I see nothing further to be done in the matter.

Mr. Sturzenacker: May we have the question, Mr. Reporter, the last question?

The Court: I think we shall have to defer further interrogation for the present. We will take a recess until 2:00 o'clock this afternoon.

(Whereupon a recess was taken until 2:00 o'clock p. m. of the same day.) [131]

(Testimony of Harold E. Davis.)

Afternoon Session

2:00 O'clock.

(Appearances as last noted.)

The Court: May we have the witness resume the stand?

H. E. DAVIS,  
recalled.

Recross Examination  
resumed.

Mr. Paradise: If the Court please, I am gravely concerned over the charge that was made by Mr. Krasne just before the close of the morning session. I must apologize for not making a statement about it earlier but I was taken completely by surprise. As I recollect it, I was reading my notes at the time. I would like the privilege, if the court please, in fairness both to the court and to both sides, to have Mr. Kelly be examined under oath, if the court feels that it is proper. The court has already examined Mr. Kelly by direct questions but Mr. Kelly was not at that time under oath. And I would like to examine Mr. Davis further on that same proposition, on the same subject matter.

The Court: I see no occasion for going further in the matter. In other words, it is conceivable that in the pressure that is entailed in the trial of a case impressions are gained. A man might be moving around in his seat in the [132] courtroom and create one impression in the mind of one onlooker and an altogether different impression in the mind of someone else and yet be wholly innocent in

(Testimony of Harold E. Davis.)

moving about. It is like what sometimes amuses one person has an altogether different effect on someone else. So I am satisfied that there is nothing further that need concern us.

Mr. Sturzenacker: Mr. Reporter, may we have that last question that was unanswered?

(Record read by reporter.)

Q. By Mr. Sturzenacker: And your best recollection at the present time is that you did not show Mr. Paradise the offer of Ferer & Sons on the 10th day of December or the acceptance of the offer by the Richfield Corporation on the 2nd day of January?

A. On the occasion of that particular meeting, you mean, don't you?

Q. Yes            A. That is correct.

The Court: May we have the exhibit numbers of those two instruments?

Mr. Sturzenacker: Exhibits 2 and 3. We offer Exhibit No. 2 and the acceptance, it being Exhibit No. 3.

Q. At the time of making this Ferer deal, had Mr. Anderson completed his work on the property?

The Court: When you say at the time of making the Ferer deal, are you referring to the entire period of negotiations? [133]

Mr. Sturzenacker: No. I had better withdraw that question.

Q. On January 8th, at the time Mr. Ferer and Mr. Clements brought the money to your office—

A. 1941?

(Testimony of Harold E. Davis.)

Q. 1941—had Mr. Anderson completed his work on the property?      A. Yes, sir.

Q. Had all of the derricks been removed?

A. Yes; they had.

Q. Had all—

A. May I make a statement there?

Q. Yes.      A. My records indicate that they had.

Q. When you were up there in September, had all of the derricks been removed?

A. I didn't see any still standing.

Q. You told us you didn't go over all of the property, did you?      A. That is correct.

Q. Your records indicate that Mr. Anderson had finished his work?      A. That is right.

Q. On January 8th?      A. Yes, sir.

Q. Do your records indicate that the pits and the [134] cellars of the various wells had all been filled as provided in the Anderson contract?

A. My records indicate that all of the work covered in the Anderson contract had been completed.

Q. Including the cleaning out of the sumps and filling them?      A. That is correct.

Q. Did you know where this loading rack was located?

A. Yes, sir.

Q. And how far it was away from the actual lease or the actual property upon which the refinery was located?

A. I don't know exactly how far away that loading rack was.



(Testimony of Harold E. Davis.)

Q. Was there a pipeline running from the refinery or from the tanks on the property to the loading rack?

A. I know there was a pipeline from the property to the loading rack.

Q. Do you know how deep that pipeline was buried?

A. No; I don't.

Q. Your description of surface equipment is that which is above the ground and that which is buried to a shallow depth below the ground, is that correct?

A. That is correct.

Q. How deep would you say that shallow burying would be? A. About two feet.

Q. Did you know that a great portion—or is it true [135] that a great portion of the refining pipes were below two feet below the ground?

A. I didn't know that.

Q. Did you supply Mr. Paradise with the rest of the information that is contained in this contract Plaintiff's Exhibit No. 4? A. No, sir.

Q. Did anybody in your presence supply him with any information relative to this contract?

Mr. Paradise: May I ask what portions of the contract Mr. Sturzenacker is referring to?

Mr. Sturzenacker: Any portion.

A. May I have that question again?

Mr. Sturzenacker: Will you read the question?

(Question read by reporter.)

A. Yes, sir.

Q. Who? A. Mr. McGahan.

(Testimony of Harold E. Davis.)

Q. Was that at the same time or when was that?

A. One time that I know of was at the same time when Mr. Ferer and Mr. Clements and Mr. Paradise and Mr. McGahan and I all met in Mr. Paradise's office.

Q. That was about the day the contract was executed or very close thereto, was it?

A. I would say that was the day that we discussed the formulation of the contract. [136]

Q. And, if I told you that contract was dated on the 17th of January, would you say it was about that date?

A. I would say it was before then.

Q. Before the 17th of January?      A. Yes, sir.

Q. Did you know that the boilers on the property were used or had been used at one time in the production of oil from that property?      A. The boilers?

Q. Yes.      A. No; I didn't know that.

Q. Do you recall of any time prior to the time that you gathered in the office of Mr. Paradise, on or about the 17th of January, that you ever showed Mr. Paradise the offer of Aaron Ferer or the acceptance, which have been introduced here as Exhibits 2 and 3?

A. I don't recall ever having showed it to him.

Q. Do you recall at this conference in the office of Mr. McGahan stating to Mr. Paradise, in the presence of Mr. Clements and Mr. Ferer, that the only property sold or contemplated to be sold was the surface equipment?

A. Would you mind repeating that question to me?

(Question read by reporter.)

A. I don't recall any such statement.

(Testimony of Harold E. Davis.)

Q. And you were never present at any other conference between Mr. Ferer, Mr. Clements and Mr. McGahan? [137] A. No.

Q. That was the only time you ever saw them together in Mr. Paradise's office?

A. All five of us; that is correct.

Mr. Sturzenacker: That is all.

Redirect Examination.

Q. By Mr. Paradise: Mr. Davis, I believe you stated in reply to Mr. Sturzenacker's question that you had not participated in any conversations concerning the exclusion of the gas lines. Did I correctly understand your answer?

A. That I had not participated in any?

Q. Yes. Did you discuss the exclusion of the gas lines with either Mr. Ferer or Mr. Clements on any occasion? A. Oh, yes; I did.

Q. Will you state when that occurred?

A. I believe that occurred on the occasion they came in and left the check with us for the sale of the equipment.

Q. In your affidavit, Mr. Davis, I call your attention to a paragraph commencing at line 29 on page 3 and extending to line 9 on page 4 and ask you to read that and state whether or not that is correct.

A. Yes; that is correct.

Q. I believe you testified this morning as to the common meaning of the phrase "surface equipment." I will ask you if in the common meaning of that expression pipelines are [138] ever referred to as surface equipment? A. Yes; they are.

(Testimony of Harold E. Davis.)

Q. Are they ever referred to as other than surface equipment, that is to say, are they ever referred to as sub-surface equipment?

A. I have never heard them referred to as that.

Q. Is that true regardless of the depth to which some of them may be buried under the surface?

A. As far as my knowledge is concerned, it is true.

Mr. Paradise: That is all.

Recross Examination.

Q. By Mr. Sturzenacker: After reading your affidavit, does it refresh your recollection as to when you first discussed these gas lines or this gas line exclusion with Mr. Ferer and Mr. Clements?

A. Yes; it does. I would like to correct a statement which I made this morning regarding those. Not only the gas lines but also the water lines and the water pump and the tanks. That discussion actually occurred with Mr. Montgomery sometime during the first part of January.

Q. And after your conference with Mr. Clements and Mr. Ferer, at which time they delivered the check?

A. I don't believe it was after that date. I believe it was before that time or about that time. I don't know the exact date. [139]

Q. Well, what is your best recollection now; that the first time you discussed these gas lines with Mr. Ferer and Mr. Clements was on the 8th day of January or was it at the meeting in Mr. Paradise's office sometime after the 8th and before the 17th?

A. They were discussed at the meeting with Mr. Ferer and Mr. Clements both in my office and in Mr. Paradise's office on the same day.

(Testimony of Harold E. Davis.)

Q. And was that discussed with them before you drew this memorandum or after, Exhibit No. 1?

A. I don't recall that.

Q. But you did not include the gas line in the memorandum Exhibit No. 1? A. That is correct.

Q. You did include the water lines and the pumps, however? A. That also is correct.

Q. Would that in any way refresh your recollection as to whether or not you discussed the water lines on the 8th?

Mr. Paradise: With whom?

Q. By Mr. Sturzenacker: With Mr. Ferer and Mr. Clements. A. The water lines?

Q. I mean the gas lines.

A. Well, we still discussed the gas lines at the same time.

Q. Wasn't it, as a matter of fact, on the 8th, when Mr. [140] Clements and Mr. Ferer were there, you actually discussed the water lines and the pumps?

A. Yes.

Q. And thereafter in Mr. Paradise's office, when you all gathered there sometime after the 8th and before the 17th, the gas lines were discussed?

A. I believe they were discussed in my office also.

Q. And you knew when you drew the memorandum that the gas line was to be excluded? A. Yes.

Q. Why didn't you exclude it then?

A. I undoubtedly forgot it.

Mr. Sturzenacker: That is all.

(Testimony of Harold E. Davis.)

Mr. Paradise: That is all. Would it be convenient to the court and counsel to have Mr. Montgomery testify now?

The Court: About how long do you think the direct examination of Mr. Montgomery will be?

Mr. Paradise: I would say not over half to three-quarters of an hour.

Mr. Sturzenacker: May I inquire if there is any question that Mr. Montgomery will not be here later on, when the case is set down for hearing?

Mr. Paradise: Frankly, if the court please, I am not quite sure as to the court's desires with reference to the further conduct of the case. Does the court intent to proceed next week with a portion of it and then defer a further [141] portion of it until January?

The Court: The thought is that we shall not be able to proceed with the trial of the case to the extent of requiring the plaintiff to put in its proof because of the position taken by counsel for the plaintiff yesterday. Under those circumstances, I indicated that a continuance would be granted to permit plaintiff's counsel to make that preparation which he said he had been unable to make. That would mean that we would not expect plaintiff to go forward with his case until some later date but that we would expect to have the interrogation of the persons whose affidavits were filed and whose cross-examination plaintiff's counsel, I think, is prepared to carry on now.

Mr. Paradise: If the plaintiff came to this trial on the merits, expecting the defendant to proceed with its proof on the counterclaim, I can't quite understand their objection to our proceeding in that fashion, that is to say,

(Testimony of Harold E. Davis.)

Mr. Zeidenfeld was the one whom the court referred to, was he not, as the one who might not be available in January?

The Court: Yes.

Mr. Paradise: I believe Mr. Zeidenfeld will be available for the balance of the afternoon and, if the court will adjourn until next week, we can get Mr. Zeidenfeld's testimony before the court before the adjournment to January and, if possible, I would like to examine Mr. Montgomery at this time, that is, if satisfactory to the court and counsel. [142]

Mr. Sturzenacker: It doesn't make any difference to counsel. We are perfectly willing to take Mr. Montgomery's testimony but I thought, inasmuch as I understood we were going to cross-examine those people who had filed affidavits, and Mr. Montgomery having no affidavit on file, and if he would be available here at the hearing, the defendant should proceed in the regular manner.

The Court: Would Mr. Montgomery's testimony be the only testimony you would expect to offer?

Mr. Paradise: Yes. And I might say the reason for wanting to put Mr. Montgomery's testimony in at this time is that Mr. Montgomery is thoroughly familiar with the oil operations which were gone into on cross-examination of the former witness, of which I am afraid the former witness didn't know a great deal, and it might clear up any difficulties or confusion in that regard.

The Court: I think that we had better give counsel the opportunity to interrogate and cross-examine those who have filed affidavits and have that out of the way first.

Mr. Paradise: All right.

Mr. Krasne: Mr. Kelly. [143]

HERBERT HUDSON KELLY,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Q. By the Clerk: Will you state your name?

A. Herbert Hudson Kelly.

Cross-Examination.

Mr. Sturzenacker: Before proceeding with the cross-examination of Mr. Kelly, may we refer to the affidavit of Mr. Kelly on file and make certain motions to strike? On page 2 of the affidavit, line 4, we move to strike that portion beginning with the words, "That at no time, either before or after the execution of said contract between Richfield and Aaron Ferer & Sons, did affiant intend to sell to Aaron Ferer & Sons the casing in any of the oil wells located upon the Casmalia property, nor did affiant intend that any of the wells upon such property be abandoned." The motion is made upon the ground that it is a conclusion and that it is not based upon any facts.

The Court: I think that is similar to the language we struck out of Mr. Davis' affidavit.

Mr. Paradise: Yes. If the court please, since Mr. Sturzenacker made his former motion with respect to Mr. Davis' affidavit and asked that a similar statement of intention be stricken, I have had occasion to examine the law on the subject and find that it is a settled rule of law [144] that, whenever the motive, belief, or intention of a person is a material fact to be proved under the issue, it may be proved by the direct testimony of such person, whether he is a party to the suit or not. There is a very thorough discussion of the entire proposition, as well as a



(Testimony of Herbert Hudson Kelly.)

compilation of the cases bearing on that subject, contained in *Howell v. Mays*, 107 Cal. App. 751. That particular case was an action by the grantor to set aside a deed of conveyance on the ground that there had been no delivery of the deed, and the question of the intention of the grantor was a material issue, as is the intention in a case for reformation. In that case a question was asked of the witness as follows: "When this paper was signed by you, that deed, did you intend to convey to them at that time the title that you had in the property?" This was objected to and the court, on appeal, held that the examination of a witness as to his own intention or his own statements was perfectly proper and competent evidence, and then went into a long, detailed discussion of it.

The same rule is set forth in the case of *Horton v. Winbigler*, 175 Cal. 149, which was an action to reform a contract.

One of the earlier cases on the subject is the case of *People v. Eel River Railroad Co.*, in 98 Cal. 665. In that case the testimony of directors of a corporation as to their intention and the intention of the corporation with reference [145] to a dedication of a road was held admissible.

Since examining those cases, if the court please, I feel that the statement in the affidavit is quite proper and should not be stricken.

Mr. Sturzenacker: Our motion is made just a little bit differently from that, may it please the court, and that is that this statement as it appears in the affidavit is not a statement of intention but a conclusion. And the same thing was true in the Davis affidavit.

(Testimony of Herbert Hudson Kelly.)

The Court: I think we ought to determine to what extent this witness had anything to do with the negotiations leading up to or attending the making of the contract that is in question here. I think that would have a bearing.

Mr. Sturzenacker: I think it may be stipulated that this witness had nothing to do with it so far as the plaintiff is concerned.

Mr. Paradise: I can't stipulate to that, Mr. Sturzenacker, for this reason, that it appears from the affidavit, as I recall it, that the contract was executed by this witness and that no other persons who negotiated the contract, particularly Harold Davis, had any authority or power to bind Richfield Oil Corporation contractually. From that the intention of this witness, who is the only one who could have bound Richfield in this action, is a very material fact in this issue.

The Court: I think what we ought to do at present is [146] this, to deny the motion without prejudice to your renewing it. And I will be glad to examine such authorities as both sides may wish to bring to the court's attention. May I have those cases again?

Mr. Paradise: Yes; *Howell v. Mays*, 107 Cal. App. 751, and the particular discussion occurs on pages 753 and 754. At that point a discussion is given of the argument—

The Court: No; I don't want you to go into detail. I merely want the citations.

Mr. Paradise: There is a full citation of the cases in that case. The other two cases I referred to are *Horton v. Winbigler*, 175 Cal. 149, and *People v. Eel River Railroad Co.*, 98 Cal. 665 at page 669.

(Testimony of Herbert Hudson Kelly.)

Mr. Sturzenacker: Going on down on the same page, your Honor, to line 16, I move to strike, and perhaps it would be a good idea for me to mention the grounds of the motion so the court will have them in mind. I move to strike the following portion on the grounds that it is on information and belief, and, therefore, constitutes hearsay and is a conclusion on the part of this witness, and that no foundation has been laid for the reception of such testimony and the witness is unqualified to so state. It begins with the words, "That affiant was and is informed that the production of oil from said wells was discontinued on or about October of 1925 because of a decreased market value at such time for such oil. That affiant was and is informed that at the time [147] of the cessation of such production activity, the reservoir of oil underlying such property had not been exhausted and at such time there remained and now remains a reservoir of oil underlying said property valued at approximately \$3,000,000, which reservoir is owned by Richfield Oil Corporation. That said wells are not now abandoned and affiant is informed by the production department of Richfield Oil Corporation that said wells may be operated for the production of oil therefrom." It is our contention that is strictly a hearsay statement. He is not, according to his testimony, an engineer or a person qualified in any way to estimate the amount of oil, if there is any at all or was when the property was abandoned, or any item that is mentioned in here. And it appears that he got his information from some other source, which is strictly hearsay.

(Testimony of Herbert Hudson Kelly.)

The Court: Don't you think that those portions of Mr. Kelly's affidavit that simply recite matters of information and belief ought to be stricken out?

Mr. Paradise: That is quite satisfactory, your Honor.

The Court: They are ordered stricken out.

Mr. Sturzenacker: Dropping down to the bottom of page 2, line 32, I move to strike, on the ground that it is strictly a conclusion, beginning with the words, "which removal was deemed advisable because of the worn condition thereof. That at the time of the removal of such derricks, tubing and rods, the wells were not abandoned and the casing was left in such [148] wells and the wells were each capped at the surface thereof in order that such wells might in the future be opened and re-entered for the production of oil therefrom." That apparently is a conclusion. It says, "deemed advisable" and it says "because of the worn condition", and there is no showing that he ever saw them or ever knew them or knew anything about them.

The Court: It is not clear in my mind as to whether the recitals to which you are now directing our attention are based upon the witness' personal knowledge or merely what somebody else told him. I think, once that is cleared up, the ruling can readily be made.

Mr. Paradise: Would the court prefer I make a statement on that or request the witness to do so?

The Court: If you are going to oppose the motion, then I think he ought to ask the witness whether that statement was based upon his own knowledge or upon what somebody else told him.

(Testimony of Herbert Hudson Kelly.)

Mr. Paradise: Shall I examine the witness on that point or Mr. Sturzenacker?

Mr. Sturzenacker: Go ahead.

Q. By Mr. Paradise: Mr. Kelly, did you hear the part that was quoted by Mr. Sturzenacker? Or I will reread it again in order that it may be before you. The affidavit states, "That during the year preceding the date of the execution of the contract dated January 17, 1941 [149] between Richfield and Aaron Ferer & Sons, Richfield Oil Corporation removed from said wells the derricks and the tubing and rods installed therein, which removal was deemed advisable because of the worn condition thereof. That at the time of the removal of such derricks, tubing and rods, the wells were not abandoned and the casing was left in such wells and the wells were each capped at the surface thereof in order that such wells might in the future be opened and re-entered for the production of oil therefrom." Will you state whether you have personal knowledge of the facts so stated?

A. I have no personal knowledge.

Q. Did you examine the property yourself?

A. No, sir.

Q. Where did you learn this information?

A. Both in management meetings and from the production department.

Q. Will you describe what you mean by management meetings?

Mr. Sturzenacker: I will object to that question because I don't think it would make any difference how he got it. It would be hearsay anyway, unquestionably.

(Testimony of Herbert Hudson Kelly.)

The Court: It just occurs to me that this line of evidence would be admissible, namely, as I understand it, this witness is the gentleman who executed the contract on behalf of the defendant. I think it is pertinent to inquire [150] as to what facts were brought to his attention or had been brought to his attention and, therefore, were within the category of the knowledge that he thereby acquired at the time he executed this contract respecting the matters here referred to. I think it perhaps would be inadvisable for me to explain my views in detail in the hearing of the witness. But, if we are privileged to inquire into what was intended by the parties, including what was known by the person who executed the contract on behalf of one of the parties, then I think it is relevant to know what matters the witness had in mind, what he had before him, when he undertook to bind his principal. I think, if I said much more, perhaps I would be apprising the witness of matters that would be the subject of inquiry.

Mr. Sturzenacker: Going down here, may it please the court, to page 3, line 10, we move to strike the remainder of that paragraph on the ground it is all alleged on information, that, "That affiant was and is informed by the production department of Richfield Oil Corporation that no casing can be removed from any oil well in California without abandonment of such well." The entire paragraph is made up on information and, therefore, belief.

Mr. Paradise: I will consent to the striking of that clause. That is from lines 10 to 27?

Mr. Sturzenacker: That is right.

(Testimony of Herbert Hudson Kelly.)

The Court: That is, beginning with the words, "That [151] affiant was"?

Mr. Sturzenacker: That is right.

The Court: And ending where?

Mr. Sturzenacker: And ending with the word "wells" in line 27.

The Court: It is ordered stricken out.

Mr. Sturzenacker: And on page 4, line 5, beginning with the word "That" and to and including the word "property" in line 14, we move to strike, the motion being made on the same grounds. Probably it would be subject to the same ruling the court made in relation to the portion on page 3, which was not stricken, the court's comments being probably the same, because it is a question of intention and what was intended. And, if we accept the court's ruling on the other as a ruling on this, I think it would probably be the same.

The Court: Are you resisting the motion?

Mr. Paradise: I understood Mr. Sturzenacker was willing to accept the same ruling, that is to say, a deferment of the ruling until some later time, is that correct, or denying the motion without prejudice?

Mr. Sturzenacker: That is correct.

The Court: That will mean that you will be free to present authorities later, Mr. Sturzenacker.

Mr. Sturzenacker: That is right.

(Testimony of Herbert Hudson Kelly.)

Q. Mr. Kelly, when was the first time that you ever met Mr. Ferer or Mr. Clements in connection with this transaction? [152]

A. That was January 8, 1941, when they brought in the check.

Q. Were you present when the check was brought in or was it delivered to you afterwards?

A. No; Mr. Davis brought the check from his office to mine and I said I would like to meet the gentlemen.

Q. And you said you would like to meet the gentlemen?      A. Yes.

Q. And that was the first time you had met them?

A. Yes.

Q. And at that time this acceptance of the 2nd of January, Plaintiff's Exhibit No. 3, had already been signed by you and forwarded, had it?

A. That is right; January 2nd.

Q. Mr. Kelly, prior to the signing of this letter, which I understand Mr. Davis dictated and you signed—

A. Correct.

Q. Prior to that time, had you ever seen the offer of Mr. Ferer, Exhibit No. 2?

A. Yes; that would come across my desk before issuance to Mr. Davis.

Q. Do you have any recollection of reading it and receiving it independently of the fact that it would automatically come across your desk?

A. All mail for the purchasing department crosses my desk and it has to be handled that way. So there would be no [153] reason for a particular letter to be emphasized in my mind.



(Testimony of Herbert Hudson Kelly.)

Q. You have no independent recollection of ever seeing this letter? A. No, sir.

Q. Do you have any independent recollection of seeing Exhibit No. 3, this letter signed by Mr. Davis, except that your signature appears there and that it went through in the regular routine?

A. Nothing. That was just a transaction.

Q. You have no independent recollection of it?

A. No.

Q. I show you Plaintiff's Exhibit No. 1, which apparently is a memorandum of sale. You heard Mr. Davis' testimony that he prepared it and so forth. Did you ever see this document or I mean have you any independent recollection of having seen the document?

A. Yes. Davis would bring that in to me and I would approve its contents.

Q. Well, did Mr. Davis bring this in to you and you approved the contents? In other words, Mr. Kelly, I am not asking you what is the usual custom of your place but I am asking you if you have any independent recollection of this deal at all yourself.

A. Yes; I remember that.

Q. And when was the first time, if you recall, that you did see it? [154]

A. The same day that Mr. Aaron Ferer and Mr. Clements and Mr. Davis were in my office.

Q. And that was after the check had been delivered?

A. That was the same date.

Q. The same date? A. Yes.

(Testimony of Herbert Hudson Kelly.)

Q. Did you go with these gentlemen to Mr. Paradise's office on that date?      A. No.

Q. You were present in Mr. Paradise's office when the formal contract was drawn, were you not?

A. No.

Q. You were not?      A. No.

Q. Are you familiar with the so-called Anderson contract?      A. Yes.

Q. And you knew what that provided for in the way of sale?      A. Yes.

Q. Was that producing or refining equipment?

A. Producing.

Q. You knew these wells had never been produced by Richfield, didn't you?      A. Yes.

Q. With the exception of these storage tanks that were mentioned as an exception in the contract, after the execution [155] of the Ferer contract, was there any producing equipment remaining in the field?

Mr. Paradise: With the exception of what?

Mr. Sturzenacker: With the exception of the six storage tanks and the pipelines, too.

A. I wouldn't know that.

Q. The other exceptions mentioned in the contract, such as the stills that had been sold to the O. C. Fields Company—those had previously been sold by your office?

A. Yes.

Q. And, with the exception of the superintendent's house and the cow barn? That wasn't part of the producing equipment, was it?      A. No.

(Testimony of Herbert Hudson Kelly.)

Q. You have been on the property. haven't you?

A. Once.

Q. How long ago?

A. Oh, about March, 1941, I think.

Q. That was after this contract was in effect?

A. Correct.

Q. Was Mr. Ferer removing the stuff at that time?

A. He was.

Q. And had the other buildings been removed at that time? Do you recall?

A. No.

Q. They were still there? [156] A. Yes.

Q. Was the pumphouse there?

A. It was still there to my knowledge.

Q. And the field office? A. Yes.

Q. It was still there? A. Yes.

Q. And you knew those were included in the contract with Mr. Ferer?

A. Yes.

Q. Did you know at the time you executed the Ferer contract that there were certain boilers on the premises necessary to be used in the production of oil from those wells?

Mr. Paradise: I object to that as stating a fact not in evidence or assuming a fact not in evidence. There is no showing that the boilers were necessary for the production of oil.

Mr. Sturzenacker: I asked him if he knew.

The Court: A slight revision of the question, I think, will be proper.

Mr. Sturzenacker: I will withdraw the question.

(Testimony of Herbert Hudson Kelly.)

Q. Do you know of any boilers on the property?

A. Yes.

Q. Do you know what they were used for?

A. No. [157]

Q. You knew those boilers were included in this sale to Ferer?              A. Yes.

Q. And the pipelines to the boilers?

A. Yes; if they were not in red on that print.

Q. Except those that were reserved as connecting the six storage tanks?              A. Correct.

Mr. Sturzenacker: That is all.

Redirect Examination.

Q. By Mr. Paradise: Mr. Kelly, I inquired of you before if you knew of your own knowledge the matters that I read from your affidavit which concerned that, during the year before the execution of the contract, Richfield Oil Corporation had removed from the wells the derricks and the tubing and rods installed therein, which removal was deemed advisable because of the worn condition thereof, and I asked you if you knew that of your own knowledge and I believe you testified that you did not but that it was told to you. Is that correct?

A. Correct.

Q. Will you tell me where you got that information?

Mr. Sturzenacker: We object to that as not proper cross-examination or not proper redirect examination, I mean, and on the further ground that it has been asked and answered [158] and the witness has testified that he doesn't know of his own knowledge. What he heard from somebody else wouldn't assist the court in determining any of the issues in this case.

(Testimony of Herbert Hudson Kelly.)

Mr. Paradise: I understood that the plaintiff intended to renew its motion to strike that portion of the affidavit and, if that motion should be made, the basis of this witness' knowledge would be important.

Mr. Krasne: As I understood the court's ruling on the matters that related to this witness' intention, those motions were denied without prejudice to being renewed, but I understood the court had denied our motion to strike the matters that this witness learned from information and belief; that the court made some observations and apparently denied our motions.

Mr. Paradise: If the motions be renewed, I would like to inquire into the background of his knowledge.

Mr. Sturzenacker: We object to that primarily on the ground it is not redirect examination. We didn't touch on it on cross-examination.

The Court: Mr. Reporter, will you read the question now to which the objection has been raised?

(Question read by reporter.)

The Court: And I think you will have to give me what immediately precedes that question.

(Record read by reporter.)

The Court: So that any doubt on the matter may be cleared [159] up, at least so far as the court's ruling is concerned, let me point this out. I think it is important to know, or at least that it is relevant to know, what facts and conditions have been brought to the attention of a person executing a contract to ascertain what the intent

(Testimony of Herbert Hudson Kelly.)

of that person was because I think it is at least a matter of argument as to whether a witness, having certain facts in mind, did or did not intend to do a certain thing. A man who is ignorant of certain facts which would have a bearing on whether or not he meant to do a certain thing would hardly claim that his intention was influenced by those facts; but I think at least it is a fair inference to argue that a man who has knowledge by way of information given to him or facts which have a bearing on whether he should or should not enter into a certain transaction may cite those circumstances as helping to throw light on the truth of his assertion that he did or did not intend to do that which would be affected by those facts which had been brought to his notice. It is not conclusive but I think it is an arguable proposition.

Mr. Krasne: Of course, we want the record to show that our objection is made to all of this line of questioning on the ground that it would be hearsay insofar as we are concerned. In other words, it would be a magnificent way of setting up a lot of self-serving declarations.

The Court: Isn't this also true, however, that so far as the issue of reformation is concerned the defendant must [160] establish either a mutual mistake or a mistake on its part of which it may fairly be concluded the plaintiff had knowledge?

Mr. Krasne: That is correct, sir.

The Court: And, in order to establish whether or not a mistake was made, which includes the question as to

(Testimony of Herbert Hudson Kelly.)

what was the intent of one or both of the parties in entering into a particular contract, I think we are now permitting at least the participants in the transaction to state both what they intended and what facts had been brought to their notice at or prior to the time they entered into the transaction. I denied the motion to strike out those portions of Mr. Kelly's affidavit wherein he asserted his intention, without prejudice, however, to the plaintiff renewing the motion, at which time authorities I assume will be presented.

Mr. Sturzenacker: We renew this portion of the objection, may it please the court, as not proper redirect examination.

The Court: Denied; overruled.

Mr. Paradise: Will you read the question, please, Mr. Reporter?

(Question read by reporter.)

Mr. Paradise: May I strike that question?

Q. I will ask if the information to which you refer you had at the time you signed the contract in question, which is dated January 17, 1941. A. Yes. [161]

Q. Did you have that information prior to that time?

A. Yes.

Q. Will you state now the circumstances under which that knowledge came to your attention.

Mr. Sturzenacker: May it be considered the same objection goes to this entire line of questioning, your Honor?

(Testimony of Herbert Hudson Kelly.)

The Court: Yes.

Mr. Sturzenacker: Thank you.

Mr. Paradise: Perhaps that question is compound, if the court please, and I will withdraw it.

Q. The first part of your affidavit stated that you knew that, within a year prior to the execution of the contract with Aaron Ferer & Sons, Richfield Oil Corporation had removed the derricks and tubing and rods installed therein. Calling your attention to Defendant's Exhibit A, did you execute this contract?

A. Yes.

Q. Were you familiar at this time, that is to say, at the date of the contract, March 12, 1940, with the fact that the derricks, tubing and rods, were to be removed?

A. Yes.

Q. You knew that of your own knowledge?

A. Yes.

Q. Your affidavit states further that at that time, during that year, Richfield Oil Corporation removed from said wells the derricks and the tubing and rods installed [162] therein, which removal was deemed advisable because of the worn condition thereof. Speaking of the period prior to January 17, 1941, what were the circumstances under which you obtained knowledge of that statement or of that fact?

A. In August of 1940, a discussion of withdrawing tubing, sucker rods and pumps, was brought up in the general meeting which we have every Tuesday.

Q. Did you say in August of 1940?                      A. Yes.

Q. That was a period after the execution of this contract, that is to say, the contract with Mr. W. R. Anderson?                      A. Yes.



(Testimony of Herbert Hudson Kelly.)

Q. And who attended that meeting?

A. The president, Mr. Jones, and three vice-presidents, Mr. Morgan, Mr. A. M. Kelley, and there was Mr. Montgomery and Mr. Autrey and Mr. Dinkins, Mr. Gross and Mr. McKay and myself, Mr. Bonner and Mr. Ragland, and I think that is all. [163]

Q. Who are those persons, Mr. Kelly, generally?

A. Do you mean in general?

Q. What is their status with the company?

A. Mr. Jones was president.

Q. I didn't mean that you detail the status of each one. But is it correct that they are all heads of their respective departments? A. Correct.

Q. Are there many meetings of that sort?

A. There is one every week.

Q. Are they held regularly? A. Yes.

Q. What is considered at those meetings? What matters are brought up?

Mr. Sturzenacker: We object to that as incompetent, irrelevant and immaterial and not proper redirect examination.

The Court: It seems to me that is going rather broadly into the subject matter. The witness has stated that at least at one of these weekly conferences certain matters were mentioned, from which I take it it will be argued that the matters there mentioned were brought to the notice of the witness.

Mr. Paradise: I was going to prove one further thing, if the court please or perhaps it would be best brought out by the testimony rather than by a statement. [164]

The Court: Yes.

(Testimony of Herbert Hudson Kelly.)

Q. By Mr. Paradise: At those regular weekly meetings, Mr. Kelly, are the policies of the Corporation determined?      A. To a large extent.

Q. What discussion took place as to the matter set forth in your affidavit, which I have read, at that conversation to which you referred?

A. Which one are you referring to now?

Q. The statement in your affidavit that during the year preceding the contract Richfield Oil Corporation removed the derricks and tubing and rods because of the worn condition of them. I believe you stated that was discussed at that meeting?

A. Yes. The production department, through Mr. Montgomery, brought the state of these particular wells to the attention of the management and Mr. Jones and recited that, the oil being of a corrosive nature, it had or possibly had corroded the tubing and the rods to the extent that it would be better to pull them at that time than to wait until a later date, where they might have great difficulty in pulling them.

Q. Was there a discussion at that meeting of the capping of the wells at the surface?      A. No.

Q. Was there any discussion at that meeting concerning any future production of oil from the wells on the property? [165]      A. That was mentioned.

Mr. Sturzenacker: Just a minute. We will object to that question as leading and suggestive and not proper redirect examination and not touched on in cross-examination.

The Court: Overruled.

Mr. Paradise: Was the question answered?

Mr. Sturzenacker: Yes; he answered it.

(Testimony of Herbert Hudson Kelly.)

Q. By Mr. Paradise: What was the discussion, Mr. Kelly, or what was said at that conversation?

Mr. Sturzenacker: The same objection, your Honor.

The Court: The same ruling.

A. Let's go back to the question.

Q. By Mr. Paradise: The question is this. Your affidavit states, on page 3, that at the time of the removal of such derricks, tubing and rods, the wells were not abandoned and the casing was left in such wells and the wells were each capped at the surface thereof in order that such wells might in the future be opened and re-entered for the production of oil therefrom. I asked you what discussion of that matter, if any, occurred at the meeting to which you have referred.

A. It was decided, as I have previously stated, to take these rods, tubing and so forth, out of the wells and to place them in a condition whereby they could be brought in in the future.

Q. Was that discussed at that meeting to which you have [166] referred?

A. At that meeting; yes.

Mr. Krasne: I move the witness' last answer be stricken on the ground that it is a conclusion. He said it was decided. I think that at least we are entitled to the benefit of knowing who said what at any such meeting.

The Court: Let that part of the answer go out. And tell us what you mean.

Q. By Mr. Paradise: Will you state the conversation, Mr. Kelly, and who participated in the conversation?

(Testimony of Herbert Hudson Kelly.)

A. Mr. Montgomery was the principal talker and it was mostly on his decision, approved by the balance of the management, that it be done and provision made for future control of the wells.

Mr. Krasne: I would like to know what Mr. Montgomery said and not this witness' conclusion when he is relating that conversation.

The Court: The best you can remember, what did he recommend or state?

A. He recommended that the tubing, the rods and the pumps, be withdrawn on the basis that they would probably be in such a weakened condition due to the corrosive nature of the oil that, if they did not withdraw them at that time, a greater expense might be incurred in the future. Does that answer the question?

Q. By Mr. Paradise: Did that meeting occur after this [167] contract was executed with Mr. Anderson or before?

Mr. Sturzenacker: Just a minute. We object to that as having been asked and answered.

The Court: It is not clear in my mind what the witness is referring to. I believe the witness testified that he signed the so-called Anderson contract. Is that right?

Mr. Paradise: That is correct, your Honor.

The Court: It is not clear in my mind, Mr. Kelly, to what pumps and rods and tubing you are referring. I believe you have told us that the name "H. H. Kelly" appearing as having signed this contract on behalf of the Richfield Oil Corporation, being Defendant's Exhibit A, is your signature?      A. Correct.

Q. This contract, I notice, is dated the 12th of March, 1940.      A. It is.

(Testimony of Herbert Hudson Kelly.)

Q. And in paragraph 4 of this contract it goes on to say, "The contractor agrees to perform the following work" and so forth, and included in that work we find the following among other items, "the pulling of pumps, rods and tubing, from all of the wells in which such equipment is present." Now, what tubing and rods are you talking about?

A. The same thing. It recites the location of the property and the wells referred to. The contract was given to the Petroleum Service Company or to a man named Anderson.

Q. What is not clear to me is this. This contract is [168] dated the 12th of March, 1940. Did I understand you to say this meeting took place several months after the contract was signed, namely, in August, 1940?

A. I was getting confused in the two things. The discussion relative to this contract was prior to the date of this contract and the discussion I have just referred to was relative to this contract.

Q. Was there a meeting in the fall of 1940, at which there was a discussion of the kind that you have been telling us about, where Mr. Montgomery recommended the removal of tubes and so forth?

A. Yes; there were discussions relative to this particular field many times but the particular dates I just don't recall.

The Court: I haven't any other questions.

Q. By Mr. Paradise: Do you recall any discussions at these executive meetings that you spoke of, Mr. Kelly, of the proposed sale of the tubing and rods to Anderson, which occurred prior to the date of the execution of that Anderson contract in March of 1940? Did you understand the question?

A. No; I don't.

(Testimony of Herbert Hudson Kelly.)

Q. Was the question of the removal of the tubing and rods and derricks from Casmalia discussed by Mr. Montgomery or by anyone else at any of the executive meetings which occurred before you signed that contract with Mr. Anderson? A. No. [169]

Q. At any of these executive meetings, was there any discussion concerning the production of oil from the wells at Casmalia? A. Yes.

Q. Did any of those meetings occur prior to January 17, 1941? A. Yes.

Q. On how many occasions was that matter mentioned at those executive meetings? Was there one meeting or was there more than one?

A. I recall one very distinctly. There may have been others.

Q. When did the one you state you recall occur?

A. In August, 1940.

Q. Is that the same meeting that you have previously testified to? A. Yes.

Mr. Paradise: I believe that is all, if the court please.

The Court: We will take a short recess.

(Short recess.)

Mr. Sturzenacker: Mr. Kelly, will you resume the stand?

#### Recross-Examination.

Q. By Mr. Sturzenacker: Mr. Kelly, you recited a conversation that took place in this meeting of August, 1940. Do you know whether or not at that time the rods and tubes [170] had been removed from the Casmalia wells? A. Yes.

(Testimony of Herbert Hudson Kelly.)

Q. They had been? A. Yes.

Q. Had the derricks been removed? A. Yes.

Q. Was any discussion had at that time about keeping the production equipment there for the purpose of producing those wells again? A. Yes.

Q. And what equipment did they decide on or was discussed that should remain there to produce those wells again?

A. The only equipment to remain, surface equipment, was that indicated on the map in red.

Q. Was that the time that the powers that be, if I may term them that way, authorized you to sell the rest of the equipment on the Casmalia lease?

A. In August; yes.

Q. And did they tell you or did anybody tell you what to except from the sale? A. Not myself personally.

Q. Was anything said at this meeting about reserving any pipelines? A. No.

Q. Do you know where this loading rack was in connection with the property? [171]

A. Just as I have seen it on the map.

Q. And that is all? A. Yes.

Q. You knew, however, that that loading rack was used for the loading of oil produced on the Casmalia property? A. No.

Q. Did you know anything about any boilers being on the property? A. Yes.

Q. And did you know that those were used in connection with the production of oil from that property?

A. No.

(Testimony of Herbert Hudson Kelly.)

Q. This tubing that was mentioned in your contract with Mr. Anderson, Plaintiff's Exhibit A, as a matter of fact, is casing, is it not? A. No.

Q. You signed this contract, didn't you?

A. Yes.

Q. I call your attention to page 4 and ask you about the first item on there, Well No. 1, under the word "Tubing", where there is a description of that, "4- $\frac{3}{4}$ " lapweld casing approx. 960'; Rods,  $\frac{7}{8}$ ", approx. 950'; Pump, 4" x 7', Axelson," which means the kind of pump. That was made by the Axelson Company, is that right? That is the name of the pump? A. Yes. [172]

Q. And what does the description of the tubing say?

A. It says, lapweld casing but it is, in my opinion, wrong.

Q. Did you ever see it? A. No.

Q. Then, you don't know whether this casing—or whether it is what was known as tubing, do you?

A. I have never heard tubing described as casing.

Q. You had this contract prepared, didn't you?

A. I signed it.

Q. Wasn't this prepared by Richfield? A. Yes.

Q. It wasn't prepared by Mr. Anderson?

A. No.

Q. At this meeting was anything said by Mr. Montgomery or anybody else about the rods and tubing corroding? A. Which meeting is that?

Q. The August, 1940 meeting.



(Testimony of Herbert Hudson Kelly.)

A. No; that wasn't discussed. I thought I had straightened that out before. I got my dates mixed. The discussion relative to the tubing, sucker rods and pumps, was previous to signing, naturally, the Anderson contract. It had to be because there was no use discussing something that had already been done.

Q. As a matter of fact, didn't Mr. Montgomery say that the rods and tubes had been removed because it was easier to [173] remove them now than later on?

A. Correct.

Q. And that, because of the corrosive condition of the oil, those tubes and rods were being destroyed?

A. Correct.

Mr. Paradise: May I ask that the reporter read the last two questions and answers, please?

(Record read by reporter.)

Mr. Paradise: I should like to make an objection to those last two questions, if the court please, because it seems to me the questions are unintelligible. The questions are compound and ask both as to a past and future date at the same time.

The Court: You may clear it up.

Mr. Paradise: Yes; all right.

Q. By Mr. Sturzenacker: Was anything said at that meeting in August, 1940, at which time Mr. Montgomery said these rods and tubes had been removed, about the casing corroding?

A. Could I correct that?

Q. Yes.

A. I say and again repeat that in the August meeting that was not mentioned. That was mentioned in the meeting previous to the Anderson contract.

(Testimony of Herbert Hudson Kelly.)

Q. Wasn't there something said at the August meeting about this other production equipment already having been [174] removed?

A. Just in general. There was nothing specific as in the previous meeting. I am sorry but I did get my dates and contracts mixed.

Q. Then, it was at that time, when these other articles had been removed, they said, "Kelly, go ahead and sell the rest of the equipment", is that right?

A. Are you talking about the August meeting?

Q. Yes.

A. That is correct; and they then directed me to remove the surface equipment.

Q. The surface equipment?

A. Yes; that was relative to the Aaron Ferer deal.

Mr. Krasne: Mr. Reporter, will you read that last answer?

(Answer read by reporter.)

Q. By Mr. Sturzenacker: This was in August, 1940?

A. Yes.

Q. Had Mr. Ferer at that time submitted a bid?

A. No.

Q. What do you mean by that was in regard to the Aaron Ferer deal?

A. As it developed to be the Aaron Ferer deal.

Q. Did you ever communicate with Mr. Ferer or Mr. Clements or anybody connected with his institution or his company—

A. No. [175]

Q. —that you were authorized to sell the surface equipment on the Casmalia field?

A. Did I personally?

(Testimony of Herbert Hudson Kelly.)

Q. Yes.

A. I did not contact them personally.

Q. What did Mr. Montgomery say, if anything, at this meeting, going back to the meeting of August, 1940, about the casing in the wells, if anything?

A. I don't think he did say anything at that meeting. It had been previously mentioned—

Q. No; just at that meeting.

A. No; there was nothing discussed at that meeting.

Q. You had that in mind, that you were just going to sell the surface equipment when Mr. Davis showed you this memorandum which has been introduced as Plaintiff's Exhibit No. 1? A. Yes.

Q. Did you read it at that time? A. Yes.

Q. Did you notice what it says on the fourth line, "Everything will be sold to the above with the exception of the following"? A. Yes.

Q. Did you see anything on that that said anything about surface equipment?

A. It is all understood— [176]

Q. Just a minute. Is there anything on that document that says anything about surface equipment?

Mr. Paradise: That is argumentative.

A. I had better read it carefully to see. I don't see where the words "surface equipment" are written into this.

Q. By Mr. Sturzenacker: And in this letter or offer of Mr. Ferer, Plaintiff's Exhibit No. 2, and the acceptance, over your signature, Plaintiff's Exhibit No. 3, is there anything that says anything about surface equipment?

(Testimony of Herbert Hudson Kelly.)

The Court: I wonder if we are serving any worthwhile purpose by questions of the latter kind? I thought counsel all agreed—

Mr. Sturzenacker: I will withdraw that question, your Honor. I think you are right.

Q. When you read those documents and saw that they didn't mention surface equipment, did you communicate the fact that you were authorized only to sell surface equipment to Mr. Ferer or anybody connected with his concern?     A. No.

Q. Mr. Kelly, did your executive staff have a meeting sometime in July or August of 1941?

A. They must have had.

Q. I am speaking of 1941, that is, after the Ferer contract was signed. And wasn't there a discussion at that time about reopening this field and trying to produce these wells? [177]

A. Not to my knowledge; not to my remembrance.

Q. These wells, so far as you know, never have been produced up to the present time?

A. Not to my knowledge, direct.

Q. Isn't it possible, Mr. Kelly, that the conversations that you are now relating relative to what Mr. Montgomery said occurred in 1941 and not in 1940?

A. No. That would be impossible.

Q. Hadn't it been decided within the year 1941 and after the Ferer contract was signed that the Richfield would attempt to produce these wells again?

A. I couldn't say.

(Testimony of Herbert Hudson Kelly.)

Q. You never heard it discussed by Richfield since the meeting of August, 1940?

A. Yes; I could say that it had been discussed.

Q. Since the signing of the Ferer contract?

A. Yes.

Q. And when was that?

A. It has been mentioned two or three times.

Q. It has been since the dispute over the question as to whether or not the Ferer contract included the casing in the wells or did not?

A. Yes.

Q. And it wasn't discussed by you prior to that time? It wasn't discussed from the August meeting until the time when the dispute arose? [178]

A. I would say that it probably would be. It has been brought out on three or four occasions. The dates I couldn't say definitely.

Q. If I told you that this dispute arose about June, 1941, would you say that there was any discussion in any of the meetings prior to June, 1941 and after August, 1940 relative to producing these wells?

A. Yes.

Q. And about when was it? How long before that?

A. 30 days.

Q. Was it before or after you went up and visited on the property?

A. After.

Q. And was some of the producing equipment that had been sold to Mr. Ferer still on the property when the matter was being discussed?

A. I don't know that.

Q. Do you know whether the tanks were still there?

A. No.

(Testimony of Herbert Hudson Kelly.)

Q. Or the boilers?                    A. No.

Q. Or the pipeline?                  A. No.

Q. Isn't it a matter of fact that your company gave Mr. Ferer notice to hurry up with the dismantling of the producing and refining facilities on that property after you [179] visited up there in March?                  A. Yes.

Q. And after the question about reproducing the wells had been discussed in your board meetings?                  A. Yes.

Q. You didn't make any investigation yourself before you signed the Ferer contract as to what portion of the merchandise sold to Mr. Ferer could be used in producing these wells, did you?                  A. No.

Q. If a discussion took place in August, 1940 relative to reproducing this field, how did it happen that you were authorized to sell the producing equipment?

A. Because we were afraid that, if—or let me put it this way, that the equipment as it was offered for sale would not have been in good enough condition in our estimation to have produced a well.

Q. Who said it wasn't in good condition?

A. It was considered not to be by the production department.

Q. Who said that it wasn't in good condition?

A. Mr. Montgomery.

Q. Did he say anything about the half a mile pipeline running to the loading rack?                  A. No.

Q. Did he say that wasn't in good condition? [180]

A. Not to my recollection.

(Testimony of Herbert Hudson Kelly.)

Q. He did say he wanted six tanks reserved?

A. Correct.

Q. And did he say anything about the rest of the tanks on the property? A. No.

Q. Was there any difference between the condition of these six tanks and any other tank on the property?

A. I don't know.

Q. Did he say anything about the rest of the pipelines, the gathering lines, that went to the tanks and the boilers that heated the steam?

A. It was described as surface equipment and should be removed and sold.

Q. Even though they were talking about reopening the field? A. Correct.

Q. Was anything said about reserving the oil house or the blacksmith shop? A. No.

Q. Was that equipment in the blacksmith shop in bad shape, so that it could not be used if they were going to reproduce the field?

A. I don't know what equipment you refer to.

Q. Do you know anything about the logs of the well?

A. No. [181]

Q. Do you know, as a matter of fact, the logs of the wells were stored there? A. No.

Q. And turned over to Mr. Ferer? A. No.

Mr. Paradise: I object to that as assuming a fact not in evidence.

Mr. Sturzenacker: I asked him if he knew they were.

(Testimony of Herbert Hudson Kelly.)

The Court: You want to know whether or not the witness learned any such thing, is that right?

Mr. Sturzenacker: That is right.

Q. Did you know anything about the log books being turned over to Mr. Ferer?      A. No.

Q. Did Mr. Montgomery say he wanted the log books preserved?      A. Not to me.

Q. Did anybody say anything about saving the records of the wells and the log books?      A. Not to me.

Q. Or the field office?      A. Not to me.

Mr. Sturzenacker: That is all. [182]

#### Redirect Examination.

Mr. Paradise: I don't like to drag this out, if the court please, but I am afraid that there is some confusion as to the dates that has been brought out both on cross-examination and redirect examination and I believe it should be cleared up for the purpose of the record.

Q. Calling your attention, Mr. Kelly, to the contract with Mr. Anderson which is dated March 12, 1940, were there any discussions in the executive meetings that you have mentioned concerning the removal of the tubing and rods and derricks from those wells at meetings which occurred prior to the time that contract was signed?

A. Yes.

Q. When did those occur? Or I think I assumed there were more than one. Was it discussed at more than one meeting prior to the execution of that contract?

A. I don't think so. It was decided to remove them and my instructions were given to formulate the contract.



(Testimony of Herbert Hudson Kelly.)

Q. I believe you testified before as to some statements Mr. Montgomery had made as to the condition of the tubing and rods and derricks on the wells. At which of those executive meetings was that statement made by Mr. Montgomery?

A. At the meeting where the instruction was given to get the rods out.

Q. Was that prior to or after the execution of this contract? [183]

A. It was prior to it.

Q. Do you recall definitely of your own recollection when it was?

A. Either one or two weeks.

Q. One or two weeks what?

A. Previous.

Mr. Sturzenacker: May I have that last question and answer?

(Record read by reporter.)

Q. By Mr. Paradise: When I say this contract, I mean the contract of March 12, 1940, with Mr. Anderson.

A. Yes.

Q. Then you also referred to a meeting of this executive committee in August of 1940. At that meeting was there any discussion of this Anderson contract or of the removal of the tubing and rods under this contract?

A. No.

Q. What was discussed at that meeting?

A. The removal of the surface equipment.

Q. Was that approximately the time when you instructed Mr. Davis to prepare for the sale of salvage equipment at Casmalia?

A. Yes.

(Testimony of Herbert Hudson Kelly.)

Q. At either of those meetings, the March meeting or the August meeting, was there any discussion as to future production of oil from the wells on the property?

[184]      A. Yes.

Mr. Krasne: I object to that as having been asked and answered.

Mr. Paradise: I realize it has been asked and answered but I was merely trying to clarify the record. We have talked of several meetings and several contracts.

The Court: Yes; he may answer again.      A. Yes.

Q. By Mr. Paradise: Was it discussed at both of those meetings?      A. Yes.

Q. Have you already stated the full substance of those conversations as to future productions? I will withdraw that question. At the August meeting was any mention made of the use of the equipment that was to be sold in connection with the future production of oil from those wells?      A. No. Why would we sell it?

Q. At that meeting was the future production of oil from those wells discussed or considered?      A. Yes.

The Court: May I interrupt to ask what meeting you are now talking about?

A. As I understand Mr. Paradise, this is the August meeting, 1940.

Q. By Mr. Paradise: Mr. Sturzenacker asked you to examine page 4 of this Anderson contract, which [185] is Defendant's Exhibit A, in which the word "casing" ap-

(Testimony of Herbert Hudson Kelly.)

pears in the inventory. I call your attention to a paragraph on page 4-a which states, "Contractor shall not remove from any wells any of the casing or liners now installed therein other than said tubing, rods and pumps above described." Did you have this provision of the contract in mind at the time you signed that contract?

A. Certainly.

Mr. Paradise: That is all.

Recross-Examination.

Q. By Mr. Sturzenacker: But you did sign a contract to allow them to remove numerous quantities of lapweld casing, did you not, which casing was used as tubing?

A. I would say yes to that.

Q. And do you know what kind of casing was used say as a protective string in the well?

A. By kind do you mean specification?

Q. Yes. A. Steel casing.

Q. Steel lapweld casing? A. I don't know.

Q. Do you know of your own knowledge at all what the casing in the wells was? A. No.

Mr. Sturzenacker: That is all. No further questions. [186]

Mr. Paradise: Did you want to cross-examine Mr. McGahan?

Mr. Sturzenacker: Yes.

The Court: Mr. McGahan may take the stand. [187]

FRANK I. McGAHAN,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Q. By the Clerk: What is your full name?

A. Frank I. McGahan.

Cross-Examination.

Mr. Sturzenacker: May it please the court, there are two affidavits of Mr. McGahan and one of them, I think, is an answer probably to an affidavit submitted by us and probably, therefore, is mostly in the negative, the main affidavit being one filed—

The Court: Do you mean the one verified February 18, 1942?

Mr. Sturzenacker: Yes; February 17 or 18, 1942.

The Court: You are referring to that one?

Mr. Sturzenacker: That is the one we are referring to; yes, your Honor.

The Court: Very well.

Mr. Sturzenacker: That is a 6-page affidavit, with some exhibits attached to it. It was verified as of the 17th. The other one is of the 18th.

The Court: Yes; I find that one. It is some five pages in length.

Mr. Sturzenacker: That is right. Calling the court's attention to page 5, line 20, beginning with the words "That [188] affiant," we move to strike the statement of the witness, "That affiant at all times intended that the equipment to be sold from the Casmalia property be limited to surface equipment. That affiant never intended

(Testimony of Frank I. McGahan.)

that the equipment to be sold from the Casmalia property include the casing in any of the oil wells on the property. That affiant never intended that any of the oil wells upon the property be abandoned," on the grounds that the statement is a conclusion strictly of the witness; that he, himself, had no authority to consummate any deal and could not have sold anything had he wanted to and it is merely a self-serving declaration and is not evidentiary in its nature and should be stricken.

The Court: I think we must make the same ruling here as we did to similar language in the other affidavits; that the motion is denied without prejudice to your renewing the same, with supporting authorities.

Q. By Mr. Sturzenacker: Mr. McGahan, when was the first time that you received any instructions to sell any property at Casmalia?

A. It was about, I should say, two or three days before September 21st, which was the first trip I made to Casmalia.

Q. Was that the first time you had ever been to Casmalia?

A. No; it was not the first time I had ever been to Casmalia but it was the first time I had ever been there in connection with this case. [189]

Q. Do you know whether or not this equipment on the Casmalia lease had been previously offered to other people by Mr. Davis before you were notified about it?

A. No; I don't.

(Testimony of Frank I. McGahan.)

Q. And, when you went on the property, did you make a list or an inventory of it?

A. I had an equipment map which the company usually has on leases of that nature and, as I made frequent trips after that date, after the 21st of September, I checked the equipment on this map and compiled notes in my notebook.

Q. When you went up there to visit the property, what equipment did you check and what map did you have?

A. I had a map which I understand is the same as the one attached to the contract.

Q. Did that show any oil wells on the property?

A. Yes, sir.

Q. So when you went up there in September you knew there were some oil wells on the property?

A. Oh, yes.

Q. You were instructed, according to your affidavit, to sell the surface equipment?      A. That is right.

Q. And was there any surface producing equipment there?      A. Surface producing equipment?

Q. Yes.

A. Well, much of the equipment that was there could be [190] called producing equipment.

Q. Were there some boilers?      A. Yes.

Q. You were never there when the wells were produced, were you?      A. No.

Q. Do you know what those boilers were used for, if they were used in the production of oil from that property?

(Testimony of Frank I. McGahan.)

A. They could have been used for several purposes, pumping from the wells or furnishing steam for the lines which were used to heat the oil for transportation. They also could have been used for a certain purpose in the refinery.

Q. You have been in the oil industry for some years?

A. Yes, sir.

Q. And you are familiar somewhat with the transportation of oil through pipe lines? A. Yes.

Q. And are you familiar with the type of oil that was produced at that Casmalia field?

A. It was a very heavy grade of oil.

Q. Do you know its gravity?

A. I couldn't say for certain but I believe it was about 9.

Q. And that is pretty heavy oil, isn't it?

A. Pretty heavy oil. [191]

Q. Will that oil flow readily through a pipeline?

A. Well, it depends on the temperature. On a hot day, it would flow and on a cold day perhaps no.

Q. For the purpose of transporting the oil, it was necessary to have steam injected in the line, is that right?

A. In most cases; yes.

Q. Did you examine those gathering lines? I believe that is what you call pipelines that go from wells to various storage tanks, gathering lines? A. Yes, sir.

Q. Did you examine those gathering lines to see whether they were so occupied?

A. It was impossible to do that without opening the lines up and I did not open up any of the lines.

(Testimony of Frank I. McGahan.)

Q. Did any of these tanks have any oil in them?

A. Yes, sir; most of the tanks had oil in them.

Q. And were the tanks in good condition?

A. Not all the tanks. The steel tanks were in good condition but the galvanized tanks, that is, the corrugated flat tanks, were most of them in very bad condition.

Q. How many steel tanks were there on the property?

A. I should say there were about 10 or possibly 12 steel tanks.

Q. And how many galvanized tanks?

A. I couldn't tell you. There was a large number but, while I made a record, I don't remember exactly how many [192] there were.

Q. You remember the contract that was finally executed, do you?      A. I don't know too much about it.

Q. Well, you remember that certain tanks were accepted?      A. Yes, sir.

Q. Do you remember what tanks those were?

A. If I remember correctly, two 55,000 and one 37,000 and one 30,000 and I believe one smaller one, 7,500 or 10,000.

Q. Were those all steel tanks?

A. Those were steel tanks; yes, sir.

Q. But some of the steel tanks were sold under this contract?      A. Some of the steel tanks were sold; yes.

Q. And all of the galvanized tanks?

A. Yes, sir; except one galvanized tank which I believe was used for water storage up on top of the hill.



(Testimony of Frank I. McGahan.)

Q. And all of the pipelines leading from the wells to these respective tanks, excepting those pipelines between the tanks that were reserved, were sold, is that right? I am speaking of oil lines.

A. Maybe I had better have that question again.

Q. I will withdraw the question. Some of the pipelines were sold under this contract?

A. Some of the pipelines were sold under the contract; yes. [193]

Q. Were those pipelines on the surface of the ground?

A. Not necessarily. Some of the lines were under the surface at one point and exposed on the surface at another. Some of them were perhaps entirely under the surface from beginning to end.

Q. And some of them were entirely underground from beginning to end?

A. I would say it is quite possible some of them were.

Q. How deep were those lines buried?

A. That I can't say. They may have been buried from perhaps two feet to eight or ten feet.

Q. Do you consider pipe that is buried eight or ten feet as surface equipment? A. Yes, sir.

Q. You were never present on the premises when Mr. Ferer or Mr. Clements or anybody representing them was there, were you?

A. Not when Mr. Ferer was there. I met Mr. Clements there accidentally, that is, I mean not by appointment, one afternoon.

(Testimony of Frank I. McGahan.)

Q. Was that after the contract was signed or before?

A. I am not entirely positive. I am not sure but I believe it was after the contract was signed.

Q. Were they at that time wrecking the equipment?

A. Yes. Well, I would like to qualify that, please. I saw Mr. Clements out there twice, once before there was any [194] work started and once while they were working on the lease.

Q. But your best impression is now that it was after the contract had been signed?

A. I am positive the second time I saw him was after the contract was signed.

Q. Did you ever examine any of the gathering lines at all to ascertain their condition as to whether or not they might be used for production of oil from that field?

A. Yes; I looked over the lines a number of times.

Q. And what was their condition?

A. The condition varied. In some cases the condition was bad and in other cases it was fair.

Q. Were any of the pipes in such a condition that they might be used if the field was going to be produced?

A. Yes.

Q. Are you familiar with the loading line that went down to the loading rack?

A. Yes, sir.

Q. That was about a half a mile long, wasn't it?

A. I believe it was; yes.

Q. What sized pipe?

A. 6-inch.

(Testimony of Frank I. McGahan.)

Q. In what condition was that?

A. I couldn't tell you for sure because that line I never walked over. It was, as you say, a half a mile or I believe it was a little longer than that. I believe most of [195] it was underground.

Q. That pipeline was used to transport oil from the storage tanks to a loading rack?

A. To a railroad loading rack; yes.

Q. And from there it was loaded into oil cars?

A. It had been while the lease was in operation.

Q. There were no pipelines in the field to which the oil could be connected and transported by a regular commercial pipeline, were there?

A. I believe the only outlet from the lease was by these storage tanks, which was this 6-inch line.

Q. Do you mean the loading rack line?

A. The loading rack line.

Q. Did anybody ever tell you, connected with Richfield, that, in August and September, 1940, they were going to reopen the field and produce oil from those wells?

A. No; nobody ever told me.

Q. Did you, after September, offer this equipment for sale to various people?

A. I did not offer it for sale. That was not my job. I simply contacted and told people about it and took them up there and showed it to them.

Q. In other words, you did things which in your mind were necessary for the purpose of allowing people to place a bid with the Richfield for the purchase of that property?

A. That is right. [196]

(Testimony of Frank I. McGahan.)

Q. Had anybody from Richfield told you that they were going to reopen this field and produce oil from it, would you have—I will withdraw that question. You are in charge of the salvage department of Richfield, are you not?      A. Yes, sir.

Q. It is your job, among other things, to dispose of surplus and useless goods?      A. That is right.

Q. And, also, to salvage secondhand materials that can be used or are usable by your company in other places?      A. Yes, sir.

Q. You also have charge of the stores, don't you?

A. Yes, sir.

Q. If anybody had told you from the Richfield Oil Company that they were going to reproduce the field and open it up for production, would you have sold the loading line from the storage tanks to the loading rack?

A. Yes, sir.

Q. How would you then have removed your oil from the field?

A. They very likely would have removed the oil by truck inasmuch as most of it is being moved in that way in these days and also because of certain problems in getting the oil to the railroad.

Q. What were those problems?

A. The gravity of the oil. [197]

Q. In other words, it had to be heated?

A. Yes, sir; that is right.

Q. Was there any drop between the storage tanks and the loading place?      A. There was; yes, sir.

(Testimony of Frank I. McGahan.)

Q. Wasn't that sufficient to carry the oil once heated?

A. No, sir, because the 6-inch line had a 2-inch steam line inside of it.

Q. And that existed all the way down, did it?

A. To the best of my knowledge.

Q. How about the gathering lines? Were any of those lines in good enough condition to be used if the wells were going to be opened?

A. There is a possibility that some of them, after reconditioning and examination, would have been good enough to use; but it was my thought, when I offered that material for sale, that the cost of examining and reconditioning this pipe would be probably about the same as it would cost us if we would come back in there to install new pipe.

Q. Did you ever actually go on the portion of the property where the wells are located? A. Yes, sir.

Q. That is a considerable distance, is it not, or some of the wells are a considerable distance from the refinery equipment? A. Yes; they were. [198]

Q. Did anybody tell you what was to be exempted from this sale? A. Yes, sir.

Q. What was to be exempted?

A. The oil wells, the six steel tanks, the dehydrators located on the lease, which did not belong to us, and the superintendent's house and I believe the cow shed and the superintendent's garage and a 2-inch gas line from the superintendent's house to one or more of the wells.

(Testimony of Frank I. McGahan.)

Q. Who told you that the oil wells were to be emptied?

A. I believe it was either Mr. Kelly or Mr. Davis in a conversation in their office just prior to September 21st.

Q. You don't recall who told you that?

A. No; I don't.

Q. Did they tell you—or you knew that the rods and the casing in the wells that had been used for tubing had been pulled out, didn't you?      A. I knew that.

Q. And you knew the derricks had been taken down?

A. Yes, sir.

Q. And you knew that the pits had been filled?

A. No; I can't say as I knew that. My knowledge of what had happened had been more from my own observation.

Q. Did you observe when you were up there after this meeting in September that the cellars of the various wells had been filled? [199]      A. No; I didn't.

Q. Was Mr. Anderson still working there when you went up?

A. I really don't know whether he was still working there on the 21st of September or not.

Q. What was the condition of the boilers that had been used in the production of oil there?

A. The condition of the boilers was that for ordinary modern practice they were obsolete.

Q. In your affidavit you say that you are acquainted with a Mr. David Zeidenfeld.      A. Yes, sir.

(Testimony of Frank I. McGahan.)

Q. How long have you know Mr. Zeidenfeld?

A. Well, I believe that I have known Mr. Zeidenfeld for possibly 7 or 8 years.

Q. And, during August or September, did you talk to Mr. Zeidenfeld about this Casmalia property?

A. Yes, sir.

Q. About when did you talk to him?

A. I can't say for certain. I believe that I talked to him possibly as early as the 1st of August.

Q. Is there anything particular about the conversation by which you can tell us approximately the date and who was present? Do you have any independent recollection, I mean, of a certain conversation that you had with him?

A. I am afraid not. I was seeing Mr. Zeidenfeld every [200] two or three days at that time in connection with other things that were being bought from the company and it would be rather difficult for me to say on which occasion I mentioned this, although I believe it was around the first of August somewhere.

Q. What was he buying from your company?

A. All kinds of obsolete scrap materials.

Q. Were those big purchases or small purchases?

A. They might run from 10 or 15 tons up to perhaps 100 or 200 tons.

Q. Did you ever sell him 100 or 200 tons?

A. I believe that the company sold to the company which he represented amounts which would probably be that large.

Q. Do you mean at one time? A. Yes.

(Testimony of Frank I. McGahan.)

Q. When is the first time that you have any specific recollection of having talked to Mr. Zeidenfeld about selling the equipment at Casmalia?

A. I still will repeat, to the best of my knowledge, that it must have been around the 1st of August, 1940.

Q. Do you ever remember having any particular conversation that you can at this time give us the date of and where it took place and the parties present?

A. Yes; I can tell you about one particular occasion which took place possibly in November or maybe in December, in which I had compiled my notations of what we had on the [201] lease to be sold and which I asked Mr. Zeidenfeld to come into my office and look at.

Q. And that was, you say, during the month of November or December?

A. I believe it was about that time; yes.

Q. Can you give us the date any closer?

A. I can't without making a guess.

Q. I don't want you to do that.

A. I worked on that list over a considerable period of time and when it was finished I believe was about the end of November.

Q. Who else was present? Do you recall?

A. I don't believe anybody else was present.

Q. Where did the conversation take place?

A. In my office in Long Beach.

Q. What was said at that time by you and Mr. Zeidenfeld?

A. Well, generally, I showed Mr. Zeidenfeld—



(Testimony of Frank I. McGahan.)

Q. First of all, will you please tell us what was said and, as you go through, tell us what you showed him if you showed him anything?

A. I said, "I have completed my little compilation here of the material on the lease up there and have it here so that I can tell you approximately how many boilers and how many pumps and how many engines and how many tanks and so on and how much pipe there is." And I said, "I have it here page by page, with the quantity and a weight estimate." And [202] then I said, "I also have totalled up the entire weight estimate and have arrived at a figure of 1,500 tons, divided as you see it on these several sheets."

Mr. Sturzenacker: May I have the last portion of that answer, Mr. Reporter?

A. I said, "divided as you see it on these several sheets."

Q. At that time was anything said about Mr. Zeidenfeld ever having or not having seen the property?

A. I asked Mr. Zeidenfeld the first time I mentioned the pending sale to go up there with me sometime and look at it.

Q. When you talked to him this time in November or December, did you know that he had or had not seen the property?

A. I knew that he had not.

Q. In your affidavit you say this conversation took place the last of November or the first of December, 1940. Would you say that is correct?

A. The conversation with Zeidenfeld?

Q. Yes. A. Yes; I would say that is correct.

(Testimony of Frank I. McGahan.)

Q. What else did you tell Mr. Zeidenfeld at this conversation? A. What else did I tell him?

Q. Yes. [203]

A. Well, to the best of my knowledge, that about covers it.

Q. Did you tell him how many tanks there were on the property? A. Yes, sir.

Q. Did you tell him about any tanks being excluded?

A. Yes, sir.

Q. What tanks did you tell him were going to be excluded?

A. I told him the six tanks excluded in the contract were the ones that were going to be excluded.

Q. What else did you tell him was going to be excluded?

A. I told Mr. Zeidenfeld of the tanks, the superintendent's house and the garage and the oil wells, of course, and I believe at the time we are talking about that I knew everything that was to be excluded and I told him everything that was to be excluded.

Q. Did you know anything about the gas line being excluded?

A. The gas line, I think, was something that came up just before the deal was made as far as I know.

Q. At that time you talked to Mr. Zeidenfeld you didn't know anything about the gas line being excluded?

A. If I knew about it, I don't remember mentioning it to him.

Q. Did you tell Mr. Zeidenfeld there were any oil wells on the property? [204]

A. I couldn't say that I did; no.

(Testimony of Frank I. McGahan.)

Q. You referred to this property for sale as the Casmalia refinery, didn't you? A. No.

Q. How did you refer to it?

A. The Soladino lease.

Q. I guess that is the proper name for it, isn't it?

A. Generally we refer to it, roughly, as Casmalia.

Q. Did you refer to it as the refinery?

A. I referred to the fact that there was a refinery on the site, but I never tried to describe the entire lease as a refinery; no.

Q. Did you refer to it as the sale of the producing and refining equipment on that property?

A. It is quite likely that I referred to it in that manner.

Q. Did you measure up these various pipelines?

A. No, sir.

Q. Where did you get your information as to the various numbers of fittings and so forth?

A. From the equipment map in the past inventories that had been taken.

Q. Those inventories were not taken by you?

A. No, sir.

Q. Or by the Richfield Company?

A. Yes; they were taken by people working for Richfield. [205]

Q. Do you know how old those inventories were?

A. I believe that the last inventory taken on that lease was in 1930.

Q. Do you know of anything having been sold off of the property in the meantime?

A. Do you mean prior to the sale to Mr. Ferer?

(Testimony of Frank I. McGahan.)

Q. That is right.

A. Yes; we had sold a couple of or several stills to the O. C. Fields Company and we had sold some miscellaneous brick and pipe to the Mid Coast Oil Company and I believe that one or more dwelling houses on the lease had been sold to individuals.

Q. Anything else? [206]

A. Well, let me see. There were stills, pipe and miscellaneous fittings to the Mid Coast Oil Company and there was some fire brick sold. I believe that was to the Mid Coast, although I am not certain about that. And then the houses. That is all I have any knowledge of.

Q. That was merchandise that had not yet been removed from the premises. Had you sold anything that had been removed from the premises?

A. Do you mean had I sold anything which at the time of the taking of these bids was gone from the property?

Q. Yes.

A. Yes; I believe that there were a couple of stills sold.

Q. Do you know that the rods and the casing in the wells that had been used as tubing had been removed and sold?

A. I have no knowledge of that other than the knowledge I have of the Anderson deal.

Q. You knew in the Anderson deal Mr. Anderson got the tubing and the rods? A. That is right.

Q. And you knew the derricks had been removed?

A. Yes.

(Testimony of Frank I. McGahan.)

Q. Did you ever tell Mr. Zeidenfeld that the casing on the property or the wells on the property were to be excluded from this sale?

A. I could not say that I did; no, sir. [207]

Q. Well, would you say that you did not tell him that?

A. No; I wouldn't say that I did not because I don't remember whether I did or not.

Q. As a matter of fact, were the casing or the wells on the property ever mentioned in any conversation between you and Mr. Zeidenfeld?

A. To the best of my knowledge, they were not mentioned.

Q. You were present, were you not, when the final contract or the terms of the final contract were gone over in Mr. Paradise's office? A. Yes, sir.

Q. That was the first time you had ever met Mr. Ferer, wasn't it?

A. No. I had met Mr. Ferer, I believe, once or twice before that.

Q. Oh, yes. You met him at your place of business some time previous to 1940? A. Yes, sir.

Q. And you had met Mr. Clements before?

A. Yes.

Q. And you were present at this conversation in Mr. Paradise's office? A. Yes, sir.

Q. Was anything said at that time about excluding the casing or the wells from the sale of the property at Casmalia?

A. I can't say I remember anything specifically [208] mentioned about the wells in that meeting other than in connection with the gas line, which I remember being mentioned as being an exception which was to be made.

(Testimony of Frank I. McGahan.)

Q. That was the gas line to the superintendent's house?

A. From the superintendent's house to one or more of the wells.

Q. You knew the wells were on the property?

A. Yes, sir.

Q. You knew there was casing in the wells, too, didn't you?

A. Yes, sir.

Q. And you knew that those casings and wells so far as your company was concerned were to be excluded from the sale?

A. Yes, sir.

Q. But you didn't say anything about it?

A. No, sir. I wasn't writing the contract.

Q. Did you ever see a copy of the contract before it was signed?

A. No, sir.

Q. I understand it was spoken about in Mr. Paradise's office and then you all went away before the contract was completed, is that right?

A. I don't know when the contract was completed. After that meeting, I left the office and I couldn't say when it was completed.

Q. At the time that the meeting was held, didn't Mr. [209] Paradise hand each person present a copy of the contract?

A. I believe that I had a copy there in the office; yes.

Q. And do you remember looking it over?

A. Yes.

Q. Did you see the excluded items on there?

A. I did.

Q. You didn't see any casing excluded, did you?

A. No, sir.

(Testimony of Frank I. McGahan.)

Q. Or any wells? A. No, sir.

Q. Did you say anything about not selling the wells or the casing or not mentioning them in the exclusion?

A. I did not.

Q. Were there any changes made in the contract after it was passed around to the various people in your presence?

A. I recall one change, and that was, I believe, the words "lumber and metal" were added.

Q. And at whose request was that change made?

A. At Mr. Ferer's request.

Q. As to these various pages of inventory which you have attached to your affidavit sworn to by you, is that the usual form in which you keep your inventory?

A. That is not an inventory.

Q. Did you tell Mr. Zeidenfeld that the estimate that you had of tonnage might or might not be correct because Richfield had only old records of the installations on this [210] property? A. Yes; I told him that.

Q. And you told him he would have to go up or have his company go up and look over the property for themselves to determine what was there for them to bid on, didn't you? A. No, sir.

Q. Did you tell him to bid on the rough figures that you gave him?

A. No, sir. I asked him to go up there with me.

Q. Did he go up with you? A. No, sir.

Q. Mr. McGahan, are you a petroleum engineer?

A. No, sir.

Q. Had you ever had any experience in the abandoning of oil wells? A. No, sir.

(Testimony of Frank I. McGahan.)

Q. You state in your affidavit that none of the casing can be removed from an oil well without abandonment of such well in accordance with the requirements of the Division of Oil and Gas of the State of California. Do you know that to be a fact?      A. That is my belief.

Q. Can't casing be removed from an oil well without abandoning it?      A. Not all of the casing; no.

Q. Can any casing be removed from a well without [211] abandoning it?

A. Well, it all depends on the type of work that you are going to do.

Q. As a matter of fact, casing can be removed under some circumstances without the abandonment of the well, can't it?

A. Some of the casing in the well; not all of it.

Q. Were you familiar with the casing record in these wells?      A. No, sir.

Q. Did you ever see the log books of the wells?

A. No, sir.

Q. Do you know where they were?

A. I believe that the records are in the home office at Los Angeles to the best of my knowledge.

Q. Do you know where the log books are?

A. Some of the old drillers' copies of the log books were in one of the old buildings on the lease.

Q. And that was sold along with the rest of the stuff?

A. That is correct.

The Court: It looks like we will have to resume this on Wednesday morning at 10:00 o'clock.



(Testimony of Frank I. McGahan.)

(Whereupon an adjournment was taken until Wednesday, September 9, 1942, at 10:00 o'clock a.m.) [212]

Los Angeles, Calif., Wednesday, September 9, 1942,  
10:00 A. M.

(Appearances as last noted.)

The Court: I would like to ask counsel in the case in which we have been engaged in trial, in the first place, how much time do you think will be required to complete the examination of the witness now on the stand?

Mr. Sturzenacker: We have only four or five more questions to ask on cross examination; probably about 10 minutes on cross examination.

Mr. Paradise: And not over 10 or 15 minutes on re-direct examination.

The Court: Then, I believe we were to hear from the witness Zeidenfeld?

Mr. Sturzenacker: That is correct.

The Court: And I believe you had one witness, Mr. Montgomery, that you wanted to put on?

Mr. Paradise: Yes.

The Court: Would you say that the interrogation of the witness Zeidenfeld would likely take at least a half a day?

Mr. Sturzenacker: I presume so, as we are starting from the beginning. But it will depend on how far Mr. Paradise expects to go.

Mr. Paradise: It depends on the nature of the court's ruling as to the use of his deposition. I am not sure whether it was the court's ruling that that deposition

(Testimony of Frank I. McGahan.)

be [213] disregarded, in which case he would have to be examined originally. It would save a great deal of time if his deposition could follow the court's present ruling.

The Court: I think we finally concluded, to use a slang phrase, that we would start from scratch with the witness Zeidenfeld.

Mr. Sturzenacker: Your Honor, I would say it would take two hours.

The Court: I am making these inquiries so as to determine what to say to counsel in the cases that are trailing. I think that gives us the information that we require.

(Hearings on criminal matters.)

(Whereupon an adjournment was taken until the following day, Thursday, September 10, 1942, at 10:00 o'clock a. m.) [214]

Los Angeles, Calif., Thursday, September 10, 1942, 10:00 A. M.

(Appearances at last noted.)

The Court: I think Mr. McGahan was on the stand.

Mr. Paradise: Before proceedings with the witness, your Honor, is it appropriate at this time for the court to make an order, under Rule 80, concerning the costs of the record? That is to say, a portion of the case may be postponed and the reporter has called my attention to the fact that it is within the discretion of the court as to the taxing of costs for a transcript to be prepared in the meantime. I don't mean to suggest that the costs should be taxed at this time but that an order be made concerning them in connection with the preparation of

(Testimony of Frank I. McGahan.)

an original transcript. I will offer a stipulation that both parties share the costs of that transcript equally and the amount to be taxed as costs. Is that satisfactory?

Mr. Krasne: I am not entirely sure of how these charges work. I should like to be enlightened. In other words, I presume we, of course, could order a copy of these proceedings. Is there a charge for an original and a charge for each of the two copies? Is that the customary arrangement?

Mr. Paradise: I understand it is merely the original, the court's copy, that will be taxed as costs.

The Court: In other words, it is, naturally, optional with counsel as to whether they wish an extra copy but it is [215] the original with which we are primarily concerned.

Mr. Krasne: That should be prepared for the court, I presume.

The Court: And both sides initially share in the cost but ultimately to be made part of the costs of the case.

Mr. Krasne: That is agreeable. [216]

FRANK I. MCGAHAN

recalled.

Cross Examination

resumed.

Q. By Mr. Sturzenacker: Mr. McGahan, at the time you were present at the meeting in Mr. Paradise's office, was this map which has been offered in evidence and attached to the contract in evidence around there at that time?

A. I really can't say. I don't remember whether it was or not.

(Testimony of Frank I. McGahan.)

Q. Did you ever see these red marks on that map in Mr. Paradise's office?

A. Well, not being sure whether I saw the map or not, I couldn't say.

Q. You, yourself, didn't make any of those exclusions or the red marks on the map?      A. No, sir.

Q. Did you, after receiving these instructions from Mr. Davis about selling the salvage equipment at Casmalia, ever ask anybody or invite anybody to bid on it?

A. Yes, sir.

Q. And who did you invite to bid?

A. Well, I invited a lot of different people, some of whom I can't just exactly remember. I remember the Union Oil Well Supply Company for one, the Atlantic Supply Company as another one and the Western Oil Field Supply Company and I believe also that there were a number of the salvage companies here in Los Angeles. [217]

Q. Did you send out any written invitations to bid or were they all oral?      A. They were all oral.

Q. Did you furnish any of them any inventory?

A. No, sir.

Q. Did you receive any bids for all of the equipment or some of the equipment?

Mr. Paradise: I object to that question on the same ground that I objected to the offered introduction of the other bids.

(Testimony of Frank I. McGahan.)

The Court: I think that is a preliminary question that might or might not be open to that objection. You may answer.

A. I did not receive any bids.

Q. By Mr. Sturzenacker: A few moments ago I asked you if you saw this map at the meeting in Mr. Paradise's office. Did I understand by your answer that you didn't see the map at all prior to the drawing of the contract?

A. I don't remember of seeing the particular map. However, the map may have been there.

Q. After this conference in the office, did you ever see the map?

A. Are you referring to the map with the markings on it?

Q. Yes. A. No, sir.

Mr. Sturzenacker: That is what I understood you to say [218] but I wasn't quite sure. That is all of the cross examination.

#### Redirect Examination

Q. By Mr. Paradise: Mr. McGahan, what is your status with Richfield Oil Corporation?

A. Supervisor of storehouses.

Q. Do your duties have anything to do with either the drilling of oil wells or the production of oil wells?

A. No, sir.

Q. Do your duties have anything to do with the operation of oil fields where oil is being produced by Richfield?  
A. No, sir.

(Testimony of Frank I. McGahan.)

Q. Have you had any experience in either the drilling of oil wells or in the production of oil from oil wells?

A. I haven't.

Q. Or in the operation of oil fields for the production of oil?

A. No, sir.

Q. In connection with the sale by Richfield of salvage equipment, does that come under your jurisdiction?

A. Not under my jurisdiction; no.

Q. Is that part of your duties?

A. It is part of my duties to assist the purchasing department in showing the material to prospective bidders.

Q. As a part of your duties in salvaging equipment, do [219] you make the determination of what equipment is to be sold and what equipment is not to be sold?

A. No, sir.

Q. From whom do you obtain instructions in that respect?

A. From the management.

Q. From which departments?

A. The exploitation department.

Q. Pardon me?

A. The exploitation department.

Q. Who is the head of that department?

A. Mr. Montgomery.

Q. From whom did you receive your instructions with respect to the sale of equipment at Casmalia?

A. My preliminary instructions were from Mr. Montgomery.

Q. Did you receive any instructions from the purchasing department which you mentioned?

A. I received detailed instructions; yes.

(Testimony of Frank I. McGahan.)

Q. The determination, then, of what equipment was to be sold was contained in those instructions?

A. Yes, sir.

Q. What were your instructions in respect to this sale of the salvage equipment?

A. My instructions were to take prospective bidders to Casmalia and show them the surface equipment which we had for sale.

Q. Was a description given to you of the type of [220] equipment to be sold at Casmalia?

A. Yes; a general description.

Q. What was the description?

A. The description was given as the surface equipment less certain things which were to be retained by the company.

Q. What were those things that were to be retained? You say surface equipment less certain things?

A. Yes, sir.

Q. What were the exclusions?

A. The exclusions were certain tanks, dehydrators, certain pipelines and some stills, that is, still bottoms and some stills.

Q. Were the items which were excluded surface equipment?

A. Yes, sir.

Q. Part of the surface equipment? Is that correct?

A. Part of the surface equipment.

(Testimony of Frank I. McGahan.)

Q. At any time during the negotiations with Aaron Ferer & Sons concerning this sale, did you have any knowledge of whether any of the tanks, boilers or the pipeline or the refinery, would be needed by the production department in connection with future production of oil from that property?

A. No; that matter was never taken up with me.

Q. Did you have any knowledge of that matter?

A. No particular knowledge; no.

Q. In answer to one of Mr. Sturzenacker's questions, I believe you stated that the pipelines which were located [221] upon the property could have been used for the production of oil from such wells. Did you so state?

A. Yes, sir.

Q. Did you know at the time these negotiations were carried on how long those pipelines had been in there?

A. To the best of my knowledge, they had been in there at least 15 years.

Q. Would the condition of those pipelines make any difference in whether or not they could be used for production purposes on or after January, 1941?

A. Oh, yes.

Mr. Krasne: I object on the ground the question is incompetent, irrelevant and immaterial.

The Court: The answer may go out.

Mr. Krasne: I think this witness has already testified he wasn't familiar with production.

The Court: He has told us he is not qualified to express an opinion on this subject matter.



(Testimony of Frank I. McGahan.)

Q. By Mr. Paradise: I believe you testified that some of the tanks were sold as a part of this sale and, also, that certain tanks were excluded. Will you describe the size of the tanks which were excluded and the size of the tanks which were sold?

A. As I remember the tanks which were excluded, there were two 55,000-barrel tanks, one approximately 37,000-barrel, a 10,000-barrel and I think a 7,000 or 7,500-barrel tank. I [222] am not just sure of the size of the last two tanks.

Q. What were the sizes of the tanks that were included in the sale?

A. The tanks that were included ranged all the way from 20- to 30-barrel up to 5,000 barrels.

Q. Where were those tanks included in the sale located?

A. They were located all over the lease.

Q. Were they in what is known as a tank battery, the tanks that were sold?

A. No; I don't think any of them were in a battery. They were more or less distributed around the lease, I should say, singly or possibly in pairs.

Q. I believe you also testified on cross examination that some of the tanks contained oil, that is to say, some of the tanks that were included in the sale. Do you know how much oil was contained in the tanks?

A. No; I couldn't say how much was in there.

Q. Were the tanks full of oil?

A. No; they were not full.

(Testimony of Frank I. McGahan.)

Q. Were there anything other than tank bottoms of oil in the tanks?

A. Tank bottoms is about what it amounted to; yes.

Q. What do you refer to as tank bottoms?

A. It is the sediment in the bottom of the tank.

Q. I believe you also testified on your examination by Mr. Sturzenacker that in your conversations with Mr. Ferer [223] and Mr. Clements and Mr. Zeidenfeld you did not mention to them that the casing in the wells was to be excluded or that the wells themselves were to be excluded, is that correct?

A. Yes, sir.

Q. What did you tell Mr. Ferer was to be sold?

A. The surface equipment less certain exceptions.

Q. Do you recall when you told him that?

A. I told him that in our first conversation.

Q. When did that occur?

A. My first conversation with Mr. Zeidenfeld, I believe, was some time—

Q. No; Mr. Ferer.

A. I had a conversation with Mr. Ferer which I believe was over the telephone and that would have been, as near as I can place it, some time between September and the first part of December. I don't remember just when.

Q. What did you tell Mr. Ferer at that time?

A. I told Mr. Ferer that we were going to sell all of the surface equipment, excluding certain items which I wasn't positive about at that time but could tell him later.

(Testimony of Frank I. McGahan.)

Q. Did you tell Mr. Ferer anything concerning an examination of the property?

A. Yes; I invited Mr. Ferer to go up there with me and look it over.

Q. Did Mr. Ferer do so? A. No, sir. [224]

Q. What did you tell Mr. Clements was to be sold as a part of this transaction?

A. The same thing; the surface equipment less such items as the company wanted to retain.

Q. Was that in one conversation or in more than one conversation with Mr. Clements?

A. I believe I had two or three conversations with Mr. Clements, and I couldn't say that I told him in the second and third conversations again that that was the case but I did in the first conversation.

Q. Do you recall where that conversation took place?

A. No; I don't exactly.

Q. Can you fix the approximate limits of when it took place?

A. To the best of my knowledge, it was around the first of November, 1940.

Q. What did you tell Mr. Zeidenfeld was to be sold as a part of this transaction?

A. I told Mr. Zeidenfeld that we were to sell the surface equipment less such items as the company wished to retain.

Q. Did you tell Mr. Zeidenfeld what those items were that the company wished to retain?

A. Yes; I did.

(Testimony of Frank I. McGahan.)

Q. When did that conversation take place?

A. That conversation took place sometime in August or [225] September, 1940.

Q. Was that *you* first conversation with Mr. Zeidenfeld?  
A. I believe it was.

Q. Did you have a subsequent conversation with Mr. Zeidenfeld concerning this matter?  
A. Yes, sir.

Q. When did that occur?

A. I had a conversation later with Mr. Zeidenfeld sometime towards the end of November or possibly the first part of December.

Q. Going back for a moment to your conversation with Mr. Clements, did you discuss with Mr. Clements anything concerning an examination of the property?

A. I don't recollect that I did.

Q. Did Mr. Clements ask you for an inventory of the property at that time?  
A. No, sir.

Q. Did he ask you anything concerning the items of property?

A. I can't say for sure. I would think that probably he did.

The Court: May I have the last question?

(Record read by reporter.)

Q. By Mr. Paradise: Do you recall what he asked you?  
A. No; I don't.

Q. Do you recall what you answered him? [226]

A. No.

(Testimony of Frank I. McGahan.)

Q. Did you tell Mr. Clements anything about the extent of your information as to the nature of the items that were to be sold?

A. I told Mr. Clements at the time I talked to him that I hadn't completed going over the lease yet and that I wasn't exactly sure what the company might wish to retain of the surface equipment and what they might want to sell.

Q. Is that as of the date of that conversation?

A. Yes; the first conversation I had with him.

Q. Calling your attention to your conversation, your second conversation, with Mr. Zeidenfeld, and I have forgotten the date which you fixed when that occurred, that you stated that that occurred, can you state approximately when your second conversation was?

A. Yes; it was either at the end of November or the first of December.

Q. At that time did you have any more information concerning the nature of the equipment to be sold at Casmalia?

A. Yes; I did.

Q. In what form did you have that information?

A. I had it in the form of notes in my notebook.

Q. I hand you 10 pages of pencil notes, Mr. McGahan, and ask you if those are the notes to which you refer.

A. They are.

Mr. Paradise: May these be marked as Defendant's Exhibit [227] 1 for identification?

The Court: Let's see; they will be Defendant's Exhibit B, I guess it is, for identification.

(Testimony of Frank I. McGahan.)

The Clerk: That is right.

Mr. Paradise: This is the same exhibit, if the court please, I think, that is attached as Defendant's Exhibit 1 to Mr. Zeidenfeld's deposition. There is a photostat in there that is attached to Mr. Zeidenfeld's deposition.

The Court: Since we are not using his deposition, that numbering may be dispensed with.

Mr. Paradise: Oh, yes; that is correct. I am sorry.

Q. By Mr. Paradise: Were these pages shown to Mr. Zeidenfeld at that occasion?      A. They were.

Q. Will you describe the manner in which they were shown to Mr. Zeidenfeld and what the conversations were concerning them?

A. I told Mr. Zeidenfeld that I had now completed more or less of a record of what was up there and what we were going to sell and asked him if he would like to come in my office and go over them with me and he said that he would. And so I opened up the book and we went through these various pages and discussed the items on each one.

Q. Did you discuss each page with Mr. Zeidenfeld?

A. Yes, sir.

Q. Did you show each page to Mr. Zeidenfeld? [228]

A. Yes, sir.

Q. What conversation occurred concerning the tonnage of equipment?

A. Mr. Zeidenfeld told me that his company was interested largely in tonnage more than they were in particular items and wanted to know and was interested in what the approximate total tonnage of this material would amount to.

(Testimony of Frank I. McGahan.)

Q. Did you tell him what that tonnage would be?

A. Yes, sir.

Q. What did you tell him?

A. I told him that my estimate was 1,500 tons.

Q. Was that an overall estimate?

A. That was an overall estimate of all the material which was to be sold.

Q. Is that estimate of 1,500 tons shown in those record? A. Yes, sir.

Q. How was that form of estimate of 1,500 tons broken down?

A. It is broken down under various headings for the various types of equipment which were included in the estimate.

Q. Is there a breakdown between production equipment and refining equipment? A. Yes, sir.

Q. What is the breakdown in that respect?

A. The breakdown in that respect is an indication in [229] the company records to show what portion of this material was located on the refinery side and what portion was located on the production side.

Q. Did you tell him the portion of the 1,500 tons that was your estimate of the pipelines on the property?

A. Yes, sir.

Q. What was that estimate?

A. Approximately 920 tons.

Q. Did you tell that to Mr. Zeidenfeld?

A. Yes, sir.

(Testimony of Frank I. McGahan.)

Q. Does one of these pages concern the pipe on the property?      A. Yes, sir.

Q. Which page is that?

A. This is the page here.

Q. Does it have a number?

A. It has one but I can't make it out.

Q. It looks to me as if it is marked page 7. Is that correct?

A. I will put my glasses on to look at it. That is right.

Q. Is the pipe that is shown on that page divided between production equipment and refining equipment?

A. Yes, sir.

Q. Does that page also give the sizes and weights and lengths of the pipe? [230]

A. Yes, sir; it gives the sizes and weights and the footage.

Q. And how many feet of pipe are contained under the production division of the page?      A. 153,537 feet.

Q. And how much on the refining end?

A. 60,265.

Mr. Paradise: I offer these as Defendant's Exhibit B, if the court please, that is to say, these pages referred to.

The Court: They consist of how many pages?

Mr. Paradise: Consisting of 10 pages of written notes.

The Court: They may be admitted and marked Defendant's Exhibit B.



## DEFENDANT'S EXHIBIT NO. "B".

## WT. ESTIMATES

Boilers —	222	Tons
Pumps —	37	—
Pipe —	920	—
Valves }	40	—
Fittings . }		—
Engines }	8	—
Motors }		—
	<hr/>	
	1227	Tons

[In circle]: 1500 Tons

## Total Estimate

Not included in the 1227 Tons

Condenser boxes	50
Mixing tanks	16
Preheaters }	6
Heat exchangers }	
Vapor tower	10
Transformers	2 84
Fire carts	
Corr ir. tanks	
Houses—buildings	

Allowing for misc. items not accounted for under heading at top of this page such as misc pipe fittings, valves, iron and steel scrap, structural steel etc.

(Defendant's Exhibit No. B)

## CASMALIA

Tentative Sales List of Prod. & Refinery  
Material & Equipment—Soladino Lease

Prod. Dept.	Refinery
Boilers	Boilers
Buildings	Buildings
Pipe—Fittings	Condenser Boxes
Valves	Cooling Towers
Engines—Motors	Heat Exchangers
Pumps	Engines—Motors
	Pumps
Tanks—Corr.	
Steel	Pipe & Fittings
	Retorts
	Stills
	Tanks—Corr.
	Steel
Dehydrators?	

(Defendant's Exhibit No. B)

## PRODUCTION — REFINERY

## CASMALIA

Refinery  
Yellow

## BOILERS

## BUILDINGS

✓20537	70	H P	}	Boil. Hse
✓20538	60			PR 20984
✓20539	70			Refinery
✓20540	60			Boiler Pt. #6

✓	692	70
✓	693	70
✓	694	90
✓	695	70
✓	696	70
✓	697	70
✓	698	70
✓	699	70

}	Boiler
	Plt #3

✓	700	40
✓	701	40
✓	702	40
✓	703	40
✓	704	40
✓	705	40
✓	706	40
✓	707	40

}	Boiler
	Plt. 36

✓	708	40
✓	709	40
✓	710	40
✓	711	40
✓	712	40
✓	713	40
✓	714	40

}	Boiler
	Plt 45

✓	716	70
✓	717	70
✓	718	70

}	Boiler
	Plt #5

✓	720	70
✓	721	70
✓	722	70
✓	723	70
✓	724	70
✓	724	70
✓	725	40

}	Boiler
	Plt 31

}	Boiler
	Plt 4

}	Load Rk.

16—40	H. P.	✓
17—70	"	
1—90	"	2 ✓
1—90	"	

36—

715 40	H P	Near Plt 4
		On Hill
719 40	H P	On Hill
		Near Cow Shed

38 TOTAL

Pr. 1479	Garage
1494	Dwell
1495	Barn
1496	Oil House
1497	Whse-Office
1498	Blksmith-M Shop
1499	Boiler Hse
17301	✓ ✓
17302	✓ ✓
17303	✓ ✓
17312	Garage
17316	Dwell 3rd
17317	✓ 2nd
17318	✓ 1st
17324	Grain Hse
17325	Boiler ✓
20978	Pump Hse
20979	Elec. Work Sh.
20980	Carp. Shop
20981	Pump House
20982	Switch ✓
20983	Cent. Hse
20984	Boiler Hse
20986	Pump ✓
20987	Comp ✓
20988	Fire Cart Hse
20989	Laboratory
In Circle:	
17322	Pump Hse
17323	✓ ✓
	Not Sold—Water Wks
	29

## —BOILERS—

18—40's	-	81 Tons
2—60's		14 ✓
17—70's		119 ✓
1—90		8
38		222 Tons

(Defendant's Exhibit No. B)

Production

Refinery

Centrifuge

22403    100 CC—4-Arm Braun    ×

Fire Extinguishers

22403    100 CC—4-Arm-Braun    ×

4284    2½    ✓    Chicago Whse    ×

4285    2½    ✓        ✓        ✓

4286    2½    ✓        ✓        Supt. Hse

4296    2½    ✓        ✓        Whse

Mixers

2—7'x26' Riveted Steel    ×

Oil and Distillate

Refinery

✓

Condensor Boxes✓    1—28'x35'x6' Deep Condensor Box  
W/2"-3"-4" Coils

✓

✓    1—40'x42'x6" Deep—Ditto  
W/2"x4"-6" Coils

✓

✓    1—10'x44'x6' Deep—Ditto  
W/3" Coils

✓

1—3'x18'x2' Deep—Ditto  
W/2" Coils

✓

Preheaters

1—8'5"x23'x12'8"    ×

Heat Exchangers    ×

1—3'6"x18'6" H.M. 3'-4' Outlets

1—2'2"x10'3"    ✓    3' Outlets

✓

3—18"x8'2" Braun W/60 Press Tubes

(Defendant's Exhibit No. B)

Heaters /

1—6"x42" W/2-4" & 4-3" Collars

✓

Tower—Vapor /

1—6'x40' "HM" Riveted

✓

Tower Cooling

1—8'x42'x8' High

Redwood ✓

Prod.

Refinery

Engines \*

6x8 Troy Ver. Steam

20445

6x8 ✓ ✓ ✓

20446

Sold ✓ 4x8 ✓ ✓ ✓

20447

23766 5 H.P. Fuller & Johnson—

Not Sold—W.N

24024 10½x12 Ajax

24043 9½x10

24044 8x10 Ames-Steam

24044

Wt. 4½ Tons

Elec Motors /

5383 10 H.P. 50 Cyc. 3 PH 220 v

Not Sold

5392 50 ✓ 60 ✓ 3 PH

Not Sold

26559 25 ✓ 60 ✓ 3 PH 440 v

20 ✓ 60 3 220 v

26560

¼ ✓ 60 Sin. 220 v

26561

15 60 3 PH 220 v

26562

Wt. 3 Tons

(Defendant's Exhibit No. B)

Compressors

PR

22456	3½x4 Belt Dr. Union	×	
	6x7 Ins. Rand		51528    22457

Transformers    ×

29908	10 KVA	230/460—60 Cyl.	1970152
29909	10 KVA	✓    ✓    ✓    ✓	85204
29910	15 KVA	13-200/12000	1785046
29911	15 KVA	✓            ✓	1785043

Steam Traps

28856	¾" Strong-Carlisle	×	28856
	¾"            ✓		Refinery
			✓
	½" Crane Tilt Trap-Type		326

Regulators

10526	3" Gas—Wilgus	×
10527	3"    ✓            ✓	
25352	3"    ✓    Flg. Type—Wilgus	

Separator

7353    10"x42" Volz—Oil Cap 3-Gal.

Prod

Refinery

Fire Carts    ×

2-200 Gal Foamite	✓
Horse Drawn	

(Defendant's Exhibit No. B)

## CASMALIA

## PRODUCTION

## REFINERY

Size	Wt. Lbs.	Wt. Braces			Wt. Total			Wt. Tube			Wt. Total			Grand Total		
		Pipe	Tons	Etc.	Pipe	Tons	Ft.	Pipe	Tons	Etc.	Pipe	Tons	Ft.	Pipe	Tons	Ft.
2"	3.75	65956	124	2006	4	67962	128	15000	28	6660	12.5	21660	40.5	89622	168.5	
3"	7.70	43641	168	1216	5	44857	173	10000	38.5	4300	16.5	14300	55	59157	228.	
4"	11.	12439	68	576	3	13015	71	10000	55	8475	47	18475	102	31490	173.	
6	19.45	19403	189	1025	10	20428	199	5000	49	750	7	5750	56	26178	255	
8"	25.55	5007	64	1538	20	6545	84	80	1			80	1	6625	85	
10	32.75	445	7			445	7							445	7	
13	57.	113	1			113	1							113	1	
18	81.	172	2.5			172	2.5							172	2.5	
		147176	623	6361	42	153537	665	40080	171	20185	83	60265	254	213802	920	

All footage &amp; weights are approx.

Following pipe included above is

located outside lease:

2"—4154'

3"—177'

4"—283'

6"—4240'

PIPE

(Defendant's Exhibit No. B)

PUMPS

Production	Refinery
5954 550 Gal Gas Pump	
6311 $5\frac{1}{4} \times 3\frac{1}{2} \times 5$ F.M.	
6312    ✓    ✓    ✓    ✓	
6316    ✓    ✓    ✓    Worth	
6317    ✓    ✓    ✓    ✓	
6319 $3 \times 2 \times 4$ F.M.	
6320 $5\frac{1}{4} \times 3\frac{1}{2} \times 5$ ✓	
6321    ✓    ✓    ✓	
6323 $3 \times 2 \times 4$	Sold
6342 $3 \times 6$ Gear	Not Sold—W.N.
27312 4' Cent.	
27313 10 H.P. W. Well—Lut.	Do Not Sell
27314 4 H.P.    ✓    ✓    ✓	Do Not Sell
27315 Rot. Belt Dr.	
4" Rot. Force	27316
4"    ✓    ✓	27317
Kinney Rot.	27318
✓    ✓	27319
27526 $5\frac{1}{2} \times 3\frac{1}{2} \times 5$ F.M.	
27599 $7 \times 4\frac{1}{2} \times 10$ ✓	
27600 $10 \times 6 \times 12$ Blake-Kno	
27601 $7 \times 4\frac{1}{2} \times 10$ F.M.	
27602 $8 \times 6 \times 10$ Smith	
27603 $10 \times 6 \times 12$ Worth.	
27604    ✓    ✓    ✓    OWS	
27605    ✓    ✓    ✓    Gardner	



## (Defendant's Exhibit No. B)

27606	10x7x12 F.M.	
27607	6x4x 6	✓
27608	7x10 Ver. Trip. Dean	Not Sold
27609	8x 8	✓ ✓ ✓
	12x7x12 Smith	27610
	10x6x12 Worth	27611
	7x4½x10 F.M.	27612
	10x6x12 Ows	27613
	9x8½x10 Worth.	27614
	10x5¾x12 Gum. Bus	27615
	6x4x6 F.M.	27616
	7x4½x10	✓ 27617
	7x4½x10	✓ 27618
	7x4½x10	✓ 27619
	6x4x6	✓ 27620
	5¼x3½x5	✓ 27621
	6x4x6 Worth	27622
	7x4½x10 F.M.	27623
	4½x3x4	✓ Sold 27624
	4½x3x4	✓ Sold 27625
	5¼x3½x5	✓ 27626
	5¼x3½x5	✓ 27627
	3x2x3	✓ × 27628
27629	7x4½x10	✓
27630	10x6x12 Worth	
27631	10x6x12	✓

Total Wt. Approx.

37 Tons

50 Pumps

(Defendant's Exhibit No. B)

## T A N K S

PROD	REF	PROD	REF	PROD	REF	PROD	REF
8467	100 Cor		585		29245		1000
68	"		50		246		275
69	"		2000		247		277
73	1250 "		500		248		278
75	100 "		532		249		279
76	1000 "		5000		250		282
77	"	R. S.	145		251		284
78	100 "		150		252		320
(8474	500	W. Plt)	100		253		500 (Water)
29219	500 "		2150		254		
220	1000 "		100		255		
224	350 "		100		256		
225	100 "		2500		257		
	655		2500		258		
*54880		29229	500		259		
*54877		*29230	500		260		
		*29231	500		261		
29232	2146		500		262		
233	2147		100		263		
234	1096		160				
235	1095		125				
236	237		266				
237	100		Galv				
	*5000		"				
	*10000		(Steel				
	*30000		Steel				
	*37254		29271				
	1242		272				
	500		273				
	500						

[Printer's note: \* Indicates Red Ink.]

Water Tanks

Flat Galv

"

"

"

Tanks shown in \*Red not to be sold

TOTAL TANKS

65

\*6

To be sold

59

Prod 32  
Ref 27

(Defendant's Exhibit No. B)

# VALVES AND FITTINGS

<u>Production</u>		<u>Refinery</u>
	Fittings    ×	
25 Tons		15 Tons [ In circle ] : 40 Tons
	Valves        ×	
35 Tons		20 Tons
	No Fittings Itemized on Production Side 25 Tons Is Rough Estimate	
		[ In circle ] : 35 Tons
60 Tons	My Estimate of Total Valves and Fittings Approx. 95 Tons	
		95 Tons _____

[Stamped]: Deft's Ex. "B". Filed Sep. 10, 1942.

(Testimony of Frank I. McGahan.)

Q. By Mr. Paradise: In answer to one of Mr. Sturzenacker's questions, Mr. McGahan, I believe you testified that under some circumstances a casing could be removed from a well without abandonment of the well.

A. Yes, sir.

Q. Do you know whether there are any statutory requirements governing the removal of casing from an oil well?

Mr. Sturzenacker: I object to that as calling for a conclusion of the witness.

The Court: I don't know why we should ask this witness that question. Can't you gentlemen agree as to what either the statutory or the regulatory requirements are? [231]

Mr. Paradise: Yes. This is by way of rebuttal, if the court please. The witness was asked on previous examination if casing could be removed from a well without abandonment and I believe he stated under some circumstances, and I wanted to bring out what those circumstances were.

The Court: I take it that the fair meaning of his answer is that it has nothing to do with what the law or the regulations would permit but, rather, that it is based on some mechanical knowledge.

Mr. Paradise: Rather than that, if the court please, what legal restrictions, or I mean what statutory requirements, must be followed before any casing could be removed.

The Court: Will that be determined by this witness' answer?

(Testimony of Frank I. McGahan.)

Mr. Paradise: No; it would not, your Honor. It is just a matter of clearing up the matter of the cross examination.

The Court: I take it that you gentlemen should be able to agree as to what the statutory law, or the regulations issued pursuant thereto, has to say on that subject.

Q. By Mr. Paradise: Are you familiar with the requirements of the Division of Oil and Gas, that is to say, what the requirements of the Division of Oil and Gas, of the State of California, are concerning any removal of casing from a well in California?

Mr. Sturzenacker: We object to that as incompetent, irrelevant and immaterial and not proper redirect examination [232] and it calls for a conclusion of the witness.

The Court: I am not sure that I get the purport of your objection. Upon what theory—

Mr. Sturzenacker: I will withdraw the objection.

The Court: I was going to ask do you claim to be entitled to the answer the witness gave in response to your inquiry and not have at least the witness indicate whether he claims to know the subject?

A. May I have that again?

Mr. Paradise: Will you read the question, Mr. Reporter?

(Question read by reporter.)

A. I don't know what the requirements are; no.

Q. By Mr. Paradise: Have you ever inquired of the Division of Oil and Gas concerning its requirements in connection with the removal of casing or the abandonment of a well?

A. No, sir.

Mr. Paradise: That is all.

(Testimony of Frank I. McGahan.)

Recross Examination

Q. By Mr. Sturzenacker: As a matter of fact, you are merely the storekeeper, charged with administering the stores or a store at Long Beach and to dispose of certain useless and surplus equipment, are you not?

A. No; I am not at Long Beach any longer.

Q. You were at this time? [233]              A. Yes.

Q. Mr. McGahan, you said that these tanks were distributed about the field, were they?

A. The tanks which we intended to sell were generally distributed around the lease; yes.

Q. Did you investigate or look these tanks over?

A. Yes; I looked at the tanks.

Q. Did you ascertain whether any of them had any oil in them or not?

A. I ascertained that most of them did have some sediment in them; yes, sir.

Q. Did you ascertain whether any of them were full of oil?

A. To the best of my knowledge and in going over the lease, I didn't find any of these tanks, which were included in the sale, which were full of oil.

Q. Can you state to this court at the present time that you examined all of the tanks in the field that were sold?

A. No; I couldn't state that because there were so many tanks or many tanks that I didn't look at, that is, not the tanks to be retained, but the tanks that were, obviously, obsolete and worn out I didn't look at.

(Testimony of Frank I. McGahan.)

Q. So you don't know whether they were filled with oil or not?

A. I don't believe, Mr. Sturzenacker, that any of them were filled with oil. [234]

Q. I wish you would answer my question. At the present time can you state to this court that any of those tanks were not filled with oil?

A. The ones that I didn't look at, no; I couldn't state that they were not filled with oil.

Q. Do you know where that oil had been produced from? A. No; I don't.

Q. Weren't these tanks that were sold adjacent to or connected with the various wells in the field?

A. Most of them were. However, I believe there were a couple of tanks which were several miles from the field.

Q. Most of these tanks were gathering tanks for gathering lines from various wells that went into these filled tanks?

A. I wouldn't say that most of them were gathering tanks; no. Some of them could have been gathering tanks.

Q. Were the smaller ones gathering tanks or what do you call the small tanks?

A. A small tank would probably be referred to as a receiving tank or possibly a shipping tank. That type of tank might possibly be located close to a well.

Q. Some of the tanks were right in the same locality as the tanks that were reserved, were they not?

A. They might have been near, yes, inasmuch as they were pretty well scattered about the lease.

(Testimony of Frank I. McGahan.)

Q. You never took anybody up to the field to show them [235] the property?      A. Oh, yes.

Q. Did you ever take Mr. Ferer up?

A. No, sir.

Q. When was this first conversation that you had with Mr. Ferer? I think you have told on redirect examination it was in September or December. What did you say about that?

A. I don't believe I was sure just when that conversation took place, Mr. Sturzenacker. As far as I know, it was sometime between the last of September and the first of November or the last of November, but I am not sure just when it was.

Q. And that was over the telephone?

A. To the best of my memory, it was.

Q. Did Mr. Ferer tell you at that time he had been up to see the property?

A. No; I have no recollection of that.

Q. He merely asked you what the company wasn't going to sell, didn't he?

A. No. As I recall, he asked me what the company was going to sell.

Q. And what did you tell him?

A. I told him we were going to sell the surface equipment from the lease less certain items which were going to be retained.

Q. You told him the company was going to sell the [236] surface equipment less certain things they were reserving?      A. Yes.



(Testimony of Frank I. McGahan.)

Q. When was this first conversation you had with Mr. Clements?

A. That I don't remember. I believe, to the best of my remembrance, it was somewhere around the first of November.

Q. And what did you tell him the company was going to sell?

A. I told him that the company was going to sell the surface equipment less certain items which we would retain.

Q. You knew Mr. Clements was quite familiar with the field, did you not?

A. I didn't know whether he had any acquaintance with the field or not.

Q. The first time you talked to Mr. Zeidenfeld about selling this equipment, what did you tell him?

A. I told Mr. Zeidenfeld we were going to sell the surface equipment less certain items which the company would retain.

Q. Do you remember anything else that you told Mr. Zeidenfeld at that first conversation besides the fact you were going to sell the surface equipment?

A. No; I don't remember any particular thing, although we had a discussion of the matter and I might have told him a number of things. I can't recall any particular item.

Q. Do you remember anything else that you told Mr. [237] Clements at this first conversation except that you were going to sell the surface equipment less certain excluded items?

(Testimony of Frank I. McGahan.)

A. I don't remember. I can say I probably called his attention to the fact that there was also probably refinery equipment there.

Q. And can you repeat any more of the conversation that you had with Mr. Clements?

A. I am afraid I can't; no.

Q. Now, in this telephonic conversation you had with Mr. Ferer, can you tell us anything you said to Mr. Ferer except that you were selling the surface equipment?

A. I cannot repeat anything. All I can remember is the general conversation.

Q. You were present at these conferences in Mr. Paradise's office and were shown a copy of this contract which at the same time was submitted to Mr. Ferer, was it not?

Mr. Paradise: I think that assumes facts not in evidence, if the court please. There is no evidence that a contract was submitted at that time.

Mr. Sturzenacker: The affidavit so states, that he was present.

Mr. Paradise: That he was present at a meeting.

Mr. Sturzenacker: All right.

Q. By Mr. Sturzenacker: You were present at this [238] meeting in Mr. Paradise's office?

A. Yes.

Q. And was a contract submitted at that time?

A. I cannot say when the contract was submitted to Mr. Ferer.

(Testimony of Frank I. McGahan.)

Q. Was there any discussion at that time as to what equipment was to be sold up there?

A. There was a discussion relative to certain items which were to be sold; yes.

Q. Didn't Mr. Paradise pass out copies of the contract to everybody in the room?

A. It is my recollection that he did.

Q. Do you recall reading that copy of the contract?

A. I don't recall reading it but I recall having it in my hand and going over it with the rest of them.

Q. Did you hear the first part of that contract read, "All of the producing and refining equipment on the Casmalia lease"? Did you hear that read?

A. I probably did.

Q. At that time did you hear anybody there say that the company was only selling the surface equipment?

A. No, sir; I did not.

Q. It isn't your contention, is it, that this Defendant's Exhibit B, these 10 pages of pencil notations, are a complete inventory of the equipment on the Casmalia lease, is it?

A. No. It is my records of the material on the Casmalia [239] lease which we were going to offer for sale. However, on those notations are certain exceptions which I made after I was informed that those particular items were to be held.

Q. Did you ever show these notations or this inventory to Mr. Davis? A. I don't know as I did.

(Testimony of Frank I. McGahan.)

Q. Or Mr. Kelly?

A. No; I can say for sure that I didn't show them to Mr. Kelly.

Q. Where did you get your estimate of 1,500 tons of salvage?

A. By taking the weights of the pipe and the boilers and the various pieces of equipment and totaling it all up.

Q. I notice that on page 1, the first page, you have items of boilers, pumps, pipe, valves, fittings, engines and motors, and you have them totaling 1,227 tons?

A. Yes.

Q. That was your estimate, was it not?

A. That was the estimate of that particular material; yes.

Q. What did you add to that to get 1,500 tons?

A. I believe the notations on there show that there were certain valves and fittings which had to be considered in a miscellaneous manner. And I might add, Mr. Sturzenacker, that in arriving at the 1,500 tons my notes there do not include any pipe under two inches and, because I knew that [240] there was lots of pipe up there under that size which I wasn't listing, I allowed for that pipe and for valves and fittings which were not itemized.

Q. Do you know, as a matter of fact, that the items which you have computed here do not total in excess of 900 tons?

A. The pipe alone, according to my estimate, was something over 900 tons.

Q. You have been up on the property recently, haven't you?

A. No, sir.

(Testimony of Frank I. McGahan.)

Q. You have been up there since Mr. Ferer has removed the equipment from the property with the exception of the oil wells or the casing out of the wells?

A. No; I have not.

Mr. Paradise: May I ask the reporter to read, I think it was, three questions back, where Mr. Sturzenacker asked if the tonnage did not amount to 900 tons? I didn't quite get that.

(Record read by reporter.)

Q. By Mr. Sturzenacker: Where did you get the figures for your pipelines?

A. Well, those figures shown there are the accepted weight for standard pipe.

Q. Did you measure these pipes?

A. No, sir. I took them from a map. [241]

Q. You don't know whether those pipes were there or not, do you?

A. No. I believe I explained that to Mr. Zeidenfeld when I showed him that estimate.

Q. So, when you showed Mr. Zeidenfeld that estimate, you now recall that you told him you were not sure that everything that was on your estimate was actually there?

A. I recall that I brought that to his attention and I also pointed out to him that there was no pipe on that estimate under two inches and that the pipe that was listed could be subject to some possible change that had been made and not recorded on the map, that is, more pipe could have been placed in the system or some pipe could have been taken out.

(Testimony of Frank I. McGahan.)

Q. How many times were you on this property for the purpose of preparing this estimate?

A. Oh, I should say about four or five times.

Q. And you never went to all of the wells, though?

A. Yes; I went to all of the wells.

Q. All of the wells and all the tanks?

A. I can't say that I went to all of the tanks; no.

Q. I notice on these various pages you have the word "sold" after certain of these items. Were those sold after you made up this estimate or before?

A. The reason for that was that in working from this equipment map I first put down everything on there and then [242] made that notation after certain items which were sold before Mr. Ferer bought the balance of it.

Q. Were those words on there at the time you showed these to Mr. Zeidenfeld?

A. I believe they were, although I can't be positive.

Q. Did you consider this a complete inventory as far as your knowledge of the field and the information given you by your maps indicated?

A. No; that is not a complete inventory.

Mr. Sturzenacker: That is all.

#### Redirect Examination

Q. By Mr. Paradise: In what sense was that not a complete inventory? I am still referring to Defendant's Exhibit B.

A. In the sense that a complete inventory would have, necessarily, had itemized everything on the lease, which it was impossible for me to do inasmuch as a portion of

(Testimony of Frank I. McGahan.)

the pipe was underground and the valves and fittings were concerned and there was no pipe under two inches taken into consideration. The descriptive matter was not complete as it would have been in an inventory.

The Court: May I interrupt here just a minute? Will you read that answer, Mr. Reporter?

(Answer read by reporter.)

Q. By Mr. Paradise: When you mentioned, Mr. McGahan, [243] the pipe underground, were you referring to the casing in the wells or to the pipelines?

A. The pipelines.

Q. Does that also include the casing in the wells?

A. No, sir.

Q. On Exhibit B, page 7 shows an itemization of pipe. Will you explain what that pipe consisted of?

A. All of the pipe on this page 7 is line pipe.

Q. What do you mean by line pipe?

A. I mean pipe that is used for the transportation of oil or steam or gas or water.

Q. Is that pipelines? A. That is pipelines.

Q. Does that page include any of the casing that was installed in the oil wells? A. No, sir.

Q. What did you tell Mr. Zeidenfeld that that page consisted of? A. Pipelines.

Q. I believe you testified that you did not take Mr. Ferer up to the Casmalia property to make an inspection of it. Did he ever ask you to take him up?

A. No, sir.

(Testimony of Frank I. McGahan.)

Q. Did you offer to take him up and show him what was to be sold?      A. Yes, sir; I did. [244]

Q. I believe you testified that at a meeting held in my office the phrase was read to you "All production and refinery equipment", and I believe you also testified that you did not state at that time that that consisted of surface equipment, is that correct?

A. That is correct.

Q. What did you understand the phrase "production and refining equipment" to mean?

Mr. Sturzenacker: Just a minute. I will object to that as calling for a conclusion of the witness.

The Court: Will it be argued that the witness knew that the phrase had the meaning which the plaintiff gives to this expression?

Mr. Sturzenacker: It will be so argued. I don't think this man is qualified to testify as to what that equipment would consist of.

The Court: I don't understand the question to be that but merely what he understood the term to mean. It has already been elicited from the witness that he had nothing to do with the production end of the business and he makes no pretense of being qualified on the subject matter.

Mr. Krasne: I think this, if the court please, that the witness has made it very apparent from his testimony that there was a decided distinction between surface equipment and other equipment, although the stress of this witness' testimony has been that he was to sell surface



(Testimony of Frank I. McGahan.)

equipment, surface [245] equipment and surface equipment. I think his own testimony shows that there is a distinction apparently between surface equipment and other equipment. And the significance of his having failed to mention surface equipment when he read only production equipment is quite apparent, and I think for him to testify as to what he considered that to mean, in the light of his testimony, would be rather meaningless.

The Court: If it is to be argued that this witness is to be bound by certain expressions he used, I think that opens the door to asking him what he meant by the expressions that he used. You may answer.

A. What was that question again, please?

(Question read by reporter.)

A. I understood production and refinery equipment to mean all surface equipment that we had for sale.

Q. By Mr. Paradise: Was that your understanding of what that phrase meant as it was used at the time it was brought to your attention at the meeting in my office?

A. Yes, sir.

Q. Did you have any other type of production equipment in mind at that time?

A. I did not.

Q. Just one more question. Getting back to your inventory, in which I think you testified that your notes did not constitute an inventory and that some items were omitted, did your overall tonnage include the omitted items? [246]

A. That was the purpose of rounding out the 1,500 tons, to include such items as I had not listed, which I knew to be there.

(Testimony of Frank I. McGahan.)

Q. And those omitted items were what?

A. Those omitted items were all pipe under two inches and valves, fittings and odds and ends of metal and steel on the lease.

Q. What was the nature of the pipe of a size less than two inches and where was that located?

A. Some of that pipe was inside of the oil lines and some of it was in use around the lease for small lines, say for water and gas.

Q. When you say inside of the oil lines, are you referring to the pipelines?

A. The oil pipelines; yes.

Q. Do you understand pipelines to be surface equipment?

A. Yes, sir.

Q. Does it matter how deep on the property pipelines are buried as to whether or not they are considered surface equipment in the oil industry?

A. No, sir.

Mr. Paradise: That is all.

#### Recross Examination

Q. By Mr. Sturzenacker: You expected these under two-inch pipelines to be sold, didn't you? [247]

A. Yes, sir.

Q. Did you ever see the offer that the Aaron Ferer Company made to Mr. Davis?

A. No, sir.

Q. Speaking of your definition of production equipment, is casing considered production equipment?

(Testimony of Frank I. McGahan.)

Mr. Paradise: I object to the question, if the court please, on the ground that it assumes a fact not in evidence.

Mr. Sturzenacker: I will withdraw the question.

Q. By Mr. Sturzenacker: In your opinion and from your interpretation of production equipment, does that include casing?

A. In my opinion, it would not. If somebody referred to production equipment to me, I would have no thought whatever that that included pipe or tubing or casing.

Q. Or rods?

A. Rods are not tubular. Rods, I would say, are production equipment.

Q. Pumps?

A. Pumps is surface and production equipment.

Q. Field tanks? A. Yes.

Q. Derricks? A. Yes.

Q. Engines? A. Right. [248]

Q. And where oil is of the consistency that this oil was at the Casmalia field and boilers used for shooting live steam into the pipelines for the purpose of allowing the oil to flow or heating it enough to make it flow, would you consider that production equipment?

A. Yes, sir.

Q. And the pipelines that ran to the wells?

A. Yes; I would.

Q. But you would not consider casing or tubing production equipment? A. No; I wouldn't.

Mr. Sturzenacker: That is all.

Mr. Paradise: That is all.

(Testimony of Frank I. McGahan.)

The Court: We will take a five-minute recess.

(Short recess.)

Mr. Paradise: May I recall Mr. McGahan for just one question, if the court please?

The Court: Very well.

Redirect Examination

Q. By Mr. Paradise: Mr. McGahan, calling your attention to the conversation which occurred in my office, to which you have testified, was it your understanding that the phrase "producing and refining equipment" referred to the same thing or to something else than the surface equipment which you had discussed with Mr. Zeidenfeld, Mr. Ferer and Mr. Clements? [249]

A. No; it referred to the same thing.

Mr. Paradise: That is all.

Mr. Sturzenacker: No questions.

Mr. Paradise: Mr. Zeidenfeld. [250]

DAVID ZEIDENFELD,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

A. David Zeidenfeld.

Direct Examination

Q. By Mr. Paradise: Mr. Zeidenfeld, have you ever been an employee of Aaron Ferer & Sons?

A. I was.

Q. At what time?

A. From January, 1940 until approximately April or May of 1941.

Mr. Krasne: May I have those dates again? And you will have to speak up.

(Testimony of David Zeidenfeld.)

A. January, 1940 until approximately April or May, 1941.

Q. By Mr. Paradise: In what capacity were you employed there?

A. As a buyer of scrap, ferrous and non-ferrous metals.

Q. For whom? A. Aaron Ferer & Sons.

Q. Did you solicit the purchase of material of that type from Richfield Oil Corporation during the time when you were employed by Aaron Ferer & Sons?

A. I did.

Q. Do you know Mr. McGahan? [251]

A. I do.

Q. Have you ever had any conversations with Mr. McGahan about the proposed sale of equipment at Casmalia? A. I did.

Q. Did you have more than one such conversation?

A. I believe there were two on this particular deal.

Q. When did the first conversation occur?

A. About September of 1940.

Q. Where did that take place?

A. At Richville.

Q. At Mr. McGahan's office?

A. Yes; in Long Beach.

Q. Will you state your recollection of that conversation?

A. Mr. McGahan told me that there was a deal coming up whereby they were going to sell a complete refinery. And I don't remember the name Casmalia being given at that time.

(Testimony of David Zeidenfeld.)

Q. Did Mr. McGahan say that the deal was to be limited to a refinery?

A. Well, there was nothing said, I don't believe, at that time any more than just a few words pertaining to there is a deal coming up and that at a latter date we will take it up a little more thoroughly.

Q. Did he state that there was to be sold any production equipment or producing equipment?

A. I don't remember whether there was stated whether it was going to be production or any other type of equipment. [252] All I knew was there was going to be a big deal coming up.

Q. Did Mr. McGahan state that it was to be limited to a refinery?

A. There was nothing really said at that time amounting to anything that was to be sold. All I know is that there was a deal coming up in the future.

Q. I think you stated something about a refinery. What was said about a refinery at that time?

A. Well, I don't think there were over four or five questions involved. If you are interested in me giving you an idea of what was said and the answers, I can give it to you in one expression, if you are interested in it.

The Court: Yes; we would like to know as best you can recall what was said in that conversation. If you don't recall the exact words, then give us the substance of what Mr. McGahan said and what you said.

A. Mr. McGahan told me that, "There is a pretty good-sized deal coming up, in which we are going to sell a lot of equipment." And I asked him, "How soon will

(Testimony of David Zeidenfeld.)

that take place?" And he told me, "Well, it will take a little while yet. We don't know whether we are going to sell the whole works or not, or whether we are going to split it up in piecemeal." And I told him at a later date, when that comes up, to let me know and that is about the end of that conversation. And I know there was something mentioned about refinery deal coming up. [253]

The Court: May I ask the reporter to read that answer slowly?

(Answer read by reporter.)

Q. By Mr. Paradise: Did Mr. McGahan tell you that there was to be any producing equipment sold?

A. There was nothing more said than what I just mentioned.

Q. Mr. Zeidenfeld, do you recall that your deposition was taken in this action on February 13th, 1942?

A. I remember that deposition.

Q. I will read you a question and answer from the deposition and ask you if that question was not asked of you and if that answer was not given by you at that time, on page 5, line 13:

"Q—Did Mr. McGahan state the equipment to be sold was to be surface equipment?

"A—At that time, if I remember right, there was supposed to be a lot of various types of refinery and producing equipment."

Was that question asked you and was that answer given by you at that time?

(Testimony of David Zeidenfeld.)

A. Well, if it is in that deposition, I am sure that I must have answered it that way. But the thing happened so long ago that I don't remember really any more said than when I said it a few minutes ago.

Q. Following that conversation, did you make any report [254] to Mr. Ferer? I mean Mr. Morris Ferer.

A. I came in the office that evening and, as is usually the case, there is a lot of commotion going on in the office, and I came in and told Mr. Ferer that there is a deal coming up at Richfield. And he told me, "Well, let me know when it is ready to take place."

Q. Did you tell him where the deal was?

A. No. I don't think, I myself, knew where the deal was.

Q. Had Mr. McGahan told you in your conversation with him where the property was located or where the equipment was located?

A. I don't remember whether there was any more said than what I said or whether there might have been something more said about it.

The Court: May I ask counsel to give me the reference to the deposition to which you directed the witness' attention a few moments ago?

Mr. Paradise: Yes, your Honor; page 5, lines 13 to 17.

Mr. Krasne: I should like, if the court please, without going through the deposition, to have the privilege of citing to your Honor other portions in the deposition where the witness said, if my memory serves me correctly, on numerous occasions, the same thing that he has said,



(Testimony of David Zeidenfeld.)

namely, that the discussion was in respect to a refinery deal coming up. In other words, that one bare statement in the deposition might be misleading if not taken in connection with all of the [255] other statements in the deposition. So I would like to have that privilege.

Mr. Paradise: I believe Mr. Krasne is privileged to use the deposition in his cross examination of the witness for impeachment purposes as well.

Q. By Mr. Paradise: Is it not true, Mr. Zeidenfeld, that Mr. McGahan told you in that conversation that the equipment was located at Casmalia?

A. He might have but the name Casmalia wasn't entrenched in my mind at that time.

Q. Do you recall whether or not he told you that Casmalia was located near Santa Maria?

A. He might have mentioned Santa Maria also.

Q. Did you tell that to Mr. Ferer in your conversation with Mr. Ferer in describing this conversation that you had had with Mr. McGahan?

A. I don't know that I told Mr. Ferer anything except that there is a deal coming up. I might have said Santa Maria or might not have because it was about 5:00 or 5:30 and there were a few people in his office, and it was just more or less referred to as a later date when something was coming up. There were a lot of deals going on at the office at the time and this was just one of many.

(Testimony of David Zeidenfeld.)

Mr. Paradise: I move to strike out that portion of the witness' statement which does not relate to what he said or what Mr. Ferer said to him as being not responsive. [256]

The Court: Let it go out.

Q. By Mr. Paradise: Did you describe the transaction in any more detail to Mr. Ferer at that time?

A. No.

Q. What was the occasion of your next discussion with Mr. McGahan?

A. I believe it was the latter part of November. I think it was the latter part of November.

Q. Where did that conversation take place?

A. The same as the first conversation.

Q. At Mr. McGahan's office?

A. Right.

Q. Will you describe what occurred at that conversation? Or, first, may I ask you was there anyone else present at that conversation?

A. Not that I know of.

Q. Will you describe what was said by both you and Mr. McGahan at that conversation?

A. Mr. McGahan said, I believe, that the property will be ready for sale within the next short period, probably a month or so or three weeks or so, and it would be advisable for me to go up and see what is up there. And there were these so-called records that you have as far as what he thought might be up there for sale.

(Testimony of David Zeidenfeld.)

Q. Are you referring now to Mr. McGahan's pencil memoranda, which are Defendant's Exhibit B? [257]

A. That is right.

Q. Did Mr. McGahan have those on that occasion of your conversation?

A. I remember seeing these records but not actually having inspected them closely. I remember just looking at the records.

Q. Did Mr. McGahan show you those pages?

A. Well, as far as showing me the pages, he had them in a book over there and he said, "Here is an idea of what we have up there." And I told him that, "I am not interested in knowing in detail what you have. I am interested in knowing how many tons you have up there so we can determine as to how much we can bid on the material. Give us an idea as to the tonnage."

Q. Did you look at those records or those memoranda for the purpose of determining that tonnage?

A. I didn't look at them at all. The only thing is Mr. McGahan had them in his hand. I didn't inspect them minutely or microscopically to a point where I knew exactly what was in the records.

Q. Do you recall that you saw any of those pages?

A. I remember distinctly on page 1 where he showed me the page and I saw "1,500" encircled. And I said, "Is that the tonnage that you figure that is up there?" And he said, "Well, my idea of that is a rough estimate but don't hold me to it as to whether there is less up there or whether there [258] is more up there. The best thing you can do is go up and look for yourself."

(Testimony of David Zeidenfeld.)

Q. Did he state that was the best estimate he had made of the tonnage?

A. He said he wouldn't guarantee that tonnage.

Q. Did Mr. McGahan tell you what that 1,500 tons consisted of?

A. Well, he told me there was a lot of equipment for sale and there was a lot of pipe for sale. I was probably in his office for about 10 minutes discussing certain things pertaining to routes to take up there and also to what might be there for sale. It was generally so many tons of steel and so many tons of pipe that was up there, that is, in his mind, that he had for sale.

Q. How many tons of steel did he say there were?

A. On this 1,500-ton calculation, I was told it was, roughly, 900 tons of pipe and 600 tons of steel.

Q. Did Mr. McGahan state what the steel consisted of?

A. Other than pipe is what the balance of 600 tons consisted of.

Q. What was the nature of the items that entered into that 600 tons of steel?

A. As far as I recall, it was refinery equipment and possibly tonnage of some of the steel in tanks.

Q. Tanks, did you say? A. Yes. [259]

Q. Do you recall whether or not that included the boilers?

A. Well, I presume in the refinery equipment that the boilers would be in that deal, too.

(Testimony of David Zeidenfeld.)

Q. Didn't it also include the production equipment other than the pipelines, Mr. Zeidenfeld?

A. Well, as far as I am concerned, I wasn't fully aware as to production equipment being mentioned too much at that time.

Q. You knew that the estimate covered both production equipment and refining equipment, did you not?

A. No; in my own mind I assumed that the tonnage up there—or in my own mind I originally assumed that there was a complete refinery for sale, with storage tanks and boilers and a few other things to run the refinery.

Q. Did you examine these—I will withdraw that. At the time Mr. McGahan called your attention to these pages at that conversation, did you see that each one of the pages, that is to say, practically each one of the pages, has two columns on it, one headed "Production Department" or "Production Equipment" and the other headed "Refinery Department" or "Refinery Equipment"?

Mr. Krasne: Just a second. I object to the question on the ground it assumes facts not in evidence. The witness has not testified that Mr. McGahan called his attention to these pages. He said he had some pages and he looked at the [260] first page because he was interested in the overall tonnage.

The Court: May we have the question read?

(Question read by reporter.)

The Court: I think the criticism is well taken.

(Testimony of David Zeidenfeld.)

Q. By Mr. Paradise: At the time of that conversation, did Mr. McGahan show you page 2?

A. To give you a detailed idea of how I inspected these pages, Mr. McGahan had them in his hand and he thumbed through every page. And I told him, "I am not interested in anything in those pages but how many tons do you have?" And I wasn't inspecting those pages as he was going through them but he tried to give me an idea of what I might go up to see. But I told him, "As far as I am concerned, all I am interested in is how many tons you have up there." And, even though I would have inspected those minutely, he says not to hold him, Mr. McGahan, to anything in those things but to go up there and inspect it myself.

Q. Would you say, Mr. Zeidenfeld, that you did not read on any of these pages the words "Production Equipment" or "Production Department" or "Refinery Equipment" or "Refining Department"?

A. I might have seen them and glanced at them but it didn't strike me at all as "Production" or "Refining", not being too familiar with the terms as a buyer of scrap iron and metals. All I knew was there was oil field supplies for sale at all times and it didn't make any difference to me [261] whether it came from the production or the refinery department. I was simply interested in tonnage and I wouldn't recall exactly enough to say what was on those pages with the exception of that circle around the "1,500" that I distinctly remember.

(Testimony of David Zeidenfeld.)

Q. Do you recall page 7? Did Mr. McGahan show you that?

A. I don't recall looking at that page at all with the exception it was thumbed through. He just went through them like this and that is about all. The only thing I do remember is he did stop at one page called "Pumps" and he said, "There are a lot of pumps on these pages that we are holding out, that are marked 'sold.'" And outside of that page and the "1,500" on page 1 I wouldn't recall anything else on the rest of the pages.

The Court: May I ask what page the witness has now been pointing out?

A. The page that I am referring to is page 8, entitled "Pumps." These were not inspected minutely, either. He probably dwelt on this for around half a minute or so, that there were certain pumps being withheld.

Q. By Mr. Paradise: Did you read that page at the time?

A. I didn't read it at all. It was just shown to me and he said, "Here are some pumps that are being held out." And I think Mr. McGahan did the talking for about half a minute and that is all there was to it.

Q. Did you see the page at that time? [262]

A. As far as seeing it, that is the only way I can tell you I remember it. I probably saw that one page.

Q. That page contains a breakdown of the pumps in two columns, does it not, one under the heading of "Production" and the other under the heading of "Refinery"?

(Testimony of David Zeidenfeld.)

Mr. Krasne: We object to that on the ground it is incompetent, irrelevant and immaterial what that page shows. It is what the witness saw at the time of his discussion with Mr. McGahan.

The Court: The document itself is in evidence. So I don't suppose we should ask the witness what it indicates.

Q. By Mr. Paradise: You stated that of the 1,500 tons, Mr. Zeidenfeld, that you were informed about at that time, 600 consisted of steel and 900 consisted of pipe. Did Mr. McGahan describe the pipe?

A. So far as Mr. McGahan describing the pipe, I have in my own mind—

Q. I asked you for your description or I mean for the conversation, Mr. Zeidenfeld.

The Court: Will you read the question?

(Question read by reporter.)

A. He described to me that there was a lot of pipe up there.

Q. By Mr. Paradise: What did he say, Mr. Zeidenfeld?

A. He might have mentioned a pipeline once in a while but as far as the whole conversation it didn't take any too [263] long a time. So that there wasn't too much could have been talked about regarding it.

Q. Did Mr. McGahan inform you of the lengths of the pipelines?

A. I don't recall anything about lengths of pipelines.



(Testimony of David Zeidenfeld.)

Q. Did he tell you anything about the sizes of the pipelines?

A. Getting back to the fact of pipelines, I don't remember of we having discussed pipelines too much. It was just the idea I was interested in so much pipe up there and I think the word "pipe" was more or less discussed.

Q. Did Mr. McGahan not tell you that the pipe that is shown on page 7 of this Defendant's Exhibit B consisted of pipelines?

A. If he did, I don't recall it.

Q. Would you say that he did not so state at that time?

A. I wouldn't want to state, being under oath.

Q. You have no recollection about that?

A. I have no recollection of it.

Q. What else was discussed at that conversation, Mr. Zeidenfeld?

A. Oh, possibly other deals that we were working on with Richfield at the same time.

Q. I mean in connection with this transaction, that is to say, in connection with the equipment at Casmalia.

A. I don't think much more was discussed about it with [264] the exception of to go up and see what is there.

Q. Did Mr. McGahan suggest that he visit the property with you or suggest that you visit it alone?

A. No; he suggested that I might make a date and meet him there sometime and inspect what was there.

(Testimony of David Zeidenfeld.)

Q. With you?

A. With me or with somebody else from the firm.

Q. At that time and at that conversation what was your understanding of the nature of the equipment at Casmalia that was being sold by Richfield?

A. The understanding that I had was that everything at Casmalia would go unless Richfield felt it didn't bring enough money and then they would split it up and sell it piecemeal.

Q. I mean the nature of the equipment that was to be sold.

A. As far as it being discussed too much, I don't remember too much about it, but I had it fixed in my own mind that there was a refinery deal at Casmalia to be sold and the only way we could determine as to what would be sold would be to go up there and inspect it.

Q. Was it your understanding that the 900 tons of pipeline were a part of the refinery?

A. I figured that the 900 tons of pipeline were parts of the refinery and interconnecting lines between tanks leading to the refinery or in the refinery. I didn't assume there [265] was anything on the lease but a refinery at the time.

Q. Did you know how far those pipelines extended?

A. I didn't know anything about the property, never having been up there.

The Court: Mr. Reporter, will you read the last two questions and answers?

(Record read by reporter.)

(Testimony of David Zeidenfeld.)

Q. By Mr. Paradise: Did Mr. McGahan tell you that surface equipment was what the property consisted of or I mean what the equipment consisted of which Richfield was selling?

A. I don't remember the term exactly being used of "surface equipment". It might have been used at some time or other but I wouldn't say that I recall it exactly being used as "surface equipment".

Q. Was it your understanding that the equipment that was to be sold was surface equipment?

A. Well, in my own mind, I assumed that the equipment up there would all be on the surface because of the fact I assumed it was a refinery to be sold.

Q. What led you to the understanding that it was the refinery alone that was to be sold? Did you arrive at that conclusion from anything Mr. McGahan said?

A. I believe Mr. McGahan says, "We have a pretty good-sized refinery deal up at Casmalia" at the second meeting.

Q. Did he describe the location of the tanks? [266]

A. I don't recall anything about the locations of tanks being mentioned at that time because I understood the property was pretty large and only by personal inspection could I determine just where everything was.

Q. Did you know how large the property was?

A. I had no idea. I know it was pretty good-sized.

Q. Did you know it was 400 acres?

A. I wouldn't want to say whether it was 400 acres or twice that large or half that small.

(Testimony of David Zeidenfeld.)

Q. Did you think the refinery covered the full 400 acres?      A. I don't know.

Mr. Krasne: I object to that as incompetent, irrelevant and immaterial.

The Court: I think the objection is well taken.

Q. By Mr. Paradise: What did Mr. McGahan state in connection with a visit to the property to be made by you and him together? Do you recall?

The Court: I think the witness has already answered that. I think, in substance, he has testified that Mr. McGahan suggested that a date be made and that either the witness or somebody meet him at the property to see what was there.

Mr. Paradise: That was the part that I wanted to develop, from that point on.

Q. By Mr. Paradise: Did Mr. McGahan tell you at that time that there would be pointed out to you the particular [267] items that were to be sold?

A. He told me at the time, if we can make arrangements to meet up there, he would go over the property with me, and, naturally, show me what was around there to be sold, I assume.

Mr. Paradise: I didn't hear that last.

(Record read by reporter.)

Q. By Mr. Paradise: Did he state that he would show you which items were to be sold at the time of that examination?

(Testimony of David Zeidenfeld.)

A. Well, that is, naturally, to be taken when you meet somebody that is supposed to show you something to sell; that he is going to show you what is going to be sold.

The Court: I think we are getting into an argument now.

Q. By Mr. Paradise: Following that conversation, Mr. Zeidenfeld, did you make any report to Mr. Morris Ferer?

A. I did. And it was the same type of report as the first report, where I came into the office late in the afternoon, after my day's travels, and I remarked to him that, "That deal is coming up pretty quick now", and I told him that it might be a good idea maybe to go up. But there were a few other people in the office, as I said before, the last time, and the same thing happened this time, and whether Mr. Ferer got the full significance of what I had said to him I don't recall.

Mr. Paradise: I move to strike the entire portion of [268] the witness' answer except as to his conversation with Mr. Ferer.

Q. By Mr. Paradise: Will you limit your answer to what you said to Mr. Ferer and what he said to you?

The Court: May I ask the reporter to read the answer?

(Answer read by reporter.)

The Court: Strike out the latter part of the answer where the witness begins to tell about other people being in the office. The balance of the answer may go out.

(Testimony of David Zeidenfeld.)

Q. By Mr. Paradise: How long after your conversation with Mr. McGahan did you make this report to Mr. Ferer?

A. Possibly the same night or same evening.

Q. Did you tell him the quantity, that is to say, the tonnage, of the equipment that Mr. McGahan had reported to you?      A. I might have.

Q. Do you recall what you told him?

A. I might have told him there was about 1,500 tons of material up there to be sold.

Q. Did you tell him—

The Court: May I interrupt here? The court is not interested in what you probably did or did not do. If you have any recollection on the subject, give us the benefit of your best recollection. Now, you have already testified concerning this second conversation with McGahan. You have also told us that you think, about the evening of the same [269] day of this conversation with McGahan, you gave some kind of a report or statement to Mr. Morris Ferer. You do remember talking to him about it, do you?      A. I do remember mentioning it to him.

The Court: Unless you can remember the exact words, tell us as best you can recall the substance of what you said, and what, if anything, Mr. Morris Ferer said.

A. I believe, to the best of my recollection, that I told him that "This Richfield deal is coming up pretty quick now," and that, if he were interested in the thing, he had better go up and take a look at it. As to whether or not I had said too much about details on it, I don't recall. If the court is interested to know, there is al-

(Testimony of David Zeidenfeld.)

ways confusion around an office or a concern like Aaron Ferer & Sons around closing time because everybody is coming in with reports, and there is only taken into consideration actual deals that are taking place now, working deals, instead of deals that might come up the next two or three weeks or a month or so.

The Court: Let the volunteered answer go out.

Q. By Mr. Paradise: Did you tell Mr. Ferer at that conversation the quantity that was to be sold and how that quantity was broken down, that is to say, in terms of tonnage?

A. I might have.

Q. Do you recall whether you did or not?

A. I wouldn't want to say for sure.

Q. Mr. Zeidenfeld, I call your attention to pages 38 and [270] 39 of your deposition and ask you if these questions were not asked of you and if these answers were not given by you at that time, starting on page 38, line 13:

"Q—Subsequent to the conversation I just mentioned, which you had in Mr. McGahan's office, what conversation did you have with Mr. Ferer about this matter?

"A—I think at one time I came into the office and there was another salesman in the office at the time. It was not exactly a meeting amongst ourselves. I think it was after 5:00 o'clock when I brought the matter up to Mr. Ferer. I don't know whether he, himself, felt—

"Q—I am only asking you for the conversation; not as to what you think Mr. Ferer felt.

"A—I don't want to guarantee exactly the day when I brought it up to him. I tried to see him a couple of days after that. There were so many deals, of which this was just one, which I brought up to him.

(Testimony of David Zeidenfeld.)

“Q—Confine yourself to your discussion with Mr. Ferer as to this particular deal. What was your conversation?

“A—My conversation with Mr. Ferer—I would like to get something straight. I remember speaking to him but whether I spoke to him first or Mr. Clements spoke to him first I don’t recall.

“Q—I am not asking about any conversation with Mr. Clements. I just asked you about your conversation with Mr. Ferer. [271]

“A—I think I spoke to him about so many tons of pipe up there and so many tons of steel.

“Q—When you say so many, did you mention the quantity?

“A—I think I told him the estimate Richfield had was, roughly, 1,500 tons, of which 900 tons was pipe and 600 tons was steel, which will have to be looked at pretty quick because they will be asking for a bid on it in the near future, in a week or two weeks from now.”

Do you recall that those questions were asked of you and those were the answers you gave at that time under oath?

A. Yes; those were the answers that I gave in the deposition, that I recall.

The Court: Where did you stop in that reading?

Mr. Paradise: Line 18 on page 39.

Q. By Mr. Paradise: Do you know whether that conversation with Mr. Ferer occurred before or after Aaron Ferer & Sons submitted its written bid to Richfield Oil Corporation?

A. Well, it took place before the bid was submitted to Richfield.



(Testimony of David Zeidenfeld.)

Q. Your conversation with Mr. Ferer took place before that bid? A. That is right.

Q. Did you have any other conversation with Mr. Morris Ferer about this transaction?

A. I don't recall whether there were any more transactions that had anything to do with talking to Mr. Ferer [272] afterwards because I understand he and Mr. Clements had been in on the deal after that.

Mr. Paradise: I move to strike out the portion starting with the words "I understand."

The Court: Let the answer go out.

Q. By Mr. Paradise: Do you recall a conversation with Mr. Ferer in which you suggested the price which Aaron Ferer & Sons should bid in making its bid to Richfield Oil Corporation for this equipment?

A. Yes; I believe that did happen after the second conversation that I had with him.

Q. After the second conversation?

A. I mean after that conversation, the second conversation with Mr. McGahan, when I came into the office and submitted that little report to Mr. Ferer.

Q. I think you testified that approximately the same evening, after you talked to Mr. McGahan and Mr. McGahan showed you the estimates and the 1,500 tons, you then reported to Mr. Ferer and told him about the tonnage, is that correct? A. I might have done that.

Q. At that same conversation, did you discuss with Mr. Ferer the price to be offered to Richfield?

A. I wouldn't want to guarantee whether it was at that time or not. It might have been. It has been so long ago I wouldn't want to confine myself. [273]

(Testimony of David Zeidenfeld.)

Q. Do you recall any other conversation when you discussed that with Mr. Ferer, that is, the price?

A. I don't remember whether there was any subsequent conversation after that or not.

The Court: Let me see if I understand the witness. Do you or do you not recall having had some kind of a conversation with Mr. Morris Ferer, wherein either you or someone during that conversation suggested a price that should be offered to Richfield?

A. I remember a conversation I had with Mr. Ferer but whether it came in the second conversation or whether it was a subsequent conversation I don't recall.

The Court: In any event, regardless of when it occurred, did it take place before Ferer & Sons submitted a bid to Richfield?      A. As far as I recall, it did.

Q. By Mr. Paradise: And what price did you suggest to Mr. Ferer, that is, suggest that Aaron Ferer & Sons bid on the property?

A. Well, I didn't suggest to Mr. Ferer that he bid anything on the property but I told him that, if he is interested in buying that property, he would have to bid somewhere in the amount of \$20,000.00.

Q. And, when you mentioned that amount, what tonnage did you have in mind?

A. Well, this 1,500 tons, roughly. [274]

Q. I didn't understand your answer to one other question. Did you state whether you recalled when that conversation took place, when you mentioned the \$20,000.00? Was that before or after Aaron Ferer & Sons submitted its bid to Richfield?      A. I believe it was before.

(Testimony of David Zeidenfeld.)

The Court: We will take a recess until 2:00 o'clock this afternoon.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day, Thursday, September 10, 1942.) [275]

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Afternoon Session

2:15 o'clock.

(Appearances as last noted.)

DAVID ZEIDENFELD,  
recalled.

Mr. Paradise: No further questions.

Cross Examination

Q. By Mr. Krasne: Mr. Zeidenfeld, I think you stated, in reply to one of Mr. Paradise's questions, that you had suggested to Mr. Ferer that he bid \$20,000 for this deal. Did you so testify?

A. I suggested it to Mr. Ferer as far as—I definitely can't say that I did suggest it to him.

Q. Had you ever seen the property that Richfield proposed to sell?      A. No; I did not.

Q. Had you ever been up to Casmalia at all?

A. Never.

Q. Do you mean to be understood, then, to say that, not having seen the property and having heard only Mr. McGahan's rough estimate as to what he thought there was there, you suggested to Mr. Ferer that he bid \$20,000 for that property?

(Testimony of David Zeidenfeld.)

A. No; I didn't mean it at all as far as that is [276] concerned. This \$20,000 figure that is being used is nothing more than what I had picked up in going around to different people who might have been bidding on it or I might have picked it up from some person at Richfield or some other place as a figure that Richfield will take for the material; that, otherwise, if they don't receive that, they will cut it up into piecemeal lots and sell it that way.

Q. Let's see if I understand you. You had heard from some source, which you don't now know or don't remember, that, unless Richfield had received \$20,000 to sell the equipment lock, stock and barrel, they would then sell it piecemeal? Is that what you meant?

A. That is the way I understood it.

Mr. Paradise: I move that the answers of the witness be stricken as to the conversations he had with other persons about the amount they would take unless that information came from Richfield. I don't understand the witness' statement in that regard. I think the cross-examination should be limited to his conversation with Mr. Ferer.

The Court: May we have the question and the answer?

Mr. Paradise: There were two questions, I think, your Honor, on the same point.

(Record read by reporter.)

The Court: By your last answer, do I understand you to say that in some conversation with Mr. Morris Ferer you told him, either in words or in substance, that, based upon [277] information that you had picked up about

(Testimony of David Zeidenfeld.)

prospective bids for this salvage, you believed that, unless Richfield received a bid of \$20,000, that company would split up the property to be sold and offer it in small lots?

A. That is the way I understood it. That \$20,000 figure does not necessarily mean that on a 1,500-ton basis I made that figure out of my own mind on that tonnage as to what it was worth because nobody ever bids on anything of that magnitude without inspection.

The Court: All I am trying to find out is what you mean by a portion of your testimony. In one of your conversations with Mr. Morris Ferer was some reference made to the figure of \$20,000?

A. I wouldn't swear to it under oath but I believe that I did mention it to him about \$20,000 might take the deal on a lump sum basis or else they will cut it up into smaller lots and sell it piecemeal.

The Court: Is it your recollection that you said something of that kind to Mr. Morris Ferer before he put in the bid?

A. Well, I believe I might have mentioned it but I can't recollect definitely that I did say it.

The Court: I will allow the testimony to stand.

Q. By Mr. Krasne: When Mr. Paradise asked you, then, if you had the 1,500 tons of material in mind when you suggested to Mr. Ferer that he would have to bid \$20,000 on [278] this deal, did you mean to convey the impression to the court that, because you thought there were 1,500 tons of material there, the bid should be in the sum of \$20,000?

A. Absolutely not.

(Testimony of David Zeidenfeld.)

Q. I believe you stated that you were a buyer for Aaron Ferer & Sons during 1940 and part of 1941. Will you please explain what you mean or what you meant when you said you were a buyer for that company? Just what did you buy? What were you authorized to buy?

A. I was authorized to buy individual lots of scrap, ferrous and non-ferrous, materials that we had bid on or to go out and inspect and bid on a per ton or per pound basis but not on materials that ran too big an amount.

Q. As a matter of fact, you didn't have any authority to make any purchase for Aaron Ferer & Sons except on a per ton basis, isn't that right?

A. That is partly correct. I did have authority on making deals where there might have been 10 or 15 tons or 20 tons involved on a lump sum basis but, when it came to a pretty good sized deal, Mr. Ferer handled it personally.

Q. And, if a deal contemplated not only the purchase of the material but the dismantling of it and the transporting of it and the estimating of the cost of those various items, you had no authority to make such purchases for Aaron Ferer & Sons, did you?

A. No; I did not. [279]

Q. Will you please explain the circumstances which attended your discussing this purchase with Mr. McGahan the first time—I will withdraw that. Did you go down to see Mr. McGahan to talk to him about this particular deal?

A. No. To explain fully, I used to make the Long Beach area or call on certain people in the Long Beach area, such as the Richfield Oil Corporation and other oil

(Testimony of David Zeidenfeld.)

companies, and I stopped in at the Richfield Oil Corporation every once in a while to see if there was anything for sale, or we might have had a bid and I was there for inspection or I might have been picking up some material.

Q. If I understand you correctly, on this first occasion you had a discussion with Mr. McGahan, did Mr. McGahan just casually mention the fact that there was a deal coming up?

A. That is the way it came up the first time.

Q. Did he on the occasion of your first discussion with him tell you that this was a refinery deal or just what kind of a deal did he tell you was coming up?

A. To the best of my recollection, it was told to me that there was a pretty good sized refinery deal for sale up north and it won't be ready for sale for a few months yet. So I told him to let me know when it comes up.

Q. Your answers in response to Mr. Paradise's question or questions are not very definite as to whether or not Mr. McGahan said anything to you about Richfield proposing to [280] sell surface equipment. I should like to ask you now whether Mr. McGahan ever used the words "surface equipment" to you in connection with the discussion of the proposed sale?

A. In my few discussions with Mr. McGahan, they were such short periods of discussion on this that I don't recall any time that "surface equipment" in itself was actually used.

Q. Would you say that he did or did not tell you that Richfield proposed to sell surface equipment?

A. Do you want that in a direct yes or no answer or can I elaborate on that?

(Testimony of David Zeidenfeld.)

Q. I would like to have a direct answer.

The Court: Then, if you wish to explain your answer, you may do so.

A. The words "surface equipment" I recall were never used to me and all I was told was that there was a refinery deal for sale up north. And from the fact that the refinery deal was for sale and pipe and other equipment, junk and so forth, I assumed in my own mind, from the fact that it was a refinery, that all of the material was such as they call surface equipment.

Mr. Krasne: I move that the last portion of the witness' answer be stricken as not responsive and not being an explanation of his answer.

The Court: As the answer now stands, I think that last sentence should go out and it is ordered stricken out.

Q. By Mr. Krasne: I take it that your answer would be [281] the same with respect to all of the conversations that you had with Mr. McGahan about this deal?

A. So far as I recollect, that is the way the discussions went.

Q. Have you now repeated, to the best of your recollection, all of the conversation that you had with Mr. McGahan the first time you discussed this deal with him?

A. Well, only what I believe I mentioned before; that it was just a casual remark by Mr. McGahan that there is a deal coming up; that a refinery deal was coming up. And I told him, when it is ready, to let me know further on it.

Q. And, when your first conversation with Mr. McGahan had been concluded, did you understand from what was said that it was a refinery that was to be sold?

A. That was my understanding.



(Testimony of David Zeidenfeld.)

Q. When you had the second conversation with Mr. McGahan, which I believe you fixed as the latter part of November—is that correct?

A. It was either the latter part of November or the first part of December.

Q. And this was the occasion, was it, when reference was made to Mr. McGahan's estimate of 1,500 tons of material?

A. That is right.

Q. At the conclusion of this second conversation with Mr. McGahan, was it your understanding that Mr. McGahan was still referring to a refinery that was to be sold? [282]

A. That is the way I understood it.

Q. And, if you have at any time in your testimony heretofore stated that you understood that something more than a refinery was for sale, do you now wish to correct that testimony?

A. Well, as far as I know or as far as I have in my own mind felt, that is all that was for sale, was a refinery.

Q. Did you or did you not know that on the Casmalia property there was anything but a refinery?

A. That is all that I thought was there, a refinery, and, as I said before, interconnecting lines between tanks to feed the refinery and that is all.

Q. When you testified that Mr. McGahan had before him on the occasion of this second conversation the pencil notations that have been introduced as Defendant's Exhibit B, I should like to ask you whether you actually read the contents of those pages.

A. I did not.

(Testimony of David Zeidenfeld.)

Mr. Paradise: Do you mean the entire contents? Is that the question?

Mr. Krasne: I will ask the question a little differently.

Q. Did you actually read page 1 of this exhibit?

A. I didn't read page 1. The only thing that interested me as far as page 1 was that item of 1,500 tons that was shown to me.

Q. That is the 1,500-ton figure that I call your [283] attention to now about the center of the page or a little bit above, is it?

A. With a circle around it; that is right.

Q. And you did not read anything else on the page, is that correct?

A. As far as I recollect, that is all that was brought to my attention with the exception of Mr. McGahan told me that there was 900 tons and 600 tons, of which 900 tons was pipe and 600 tons was steel.

Q. I call your attention to page 2 and I will ask you whether or not you read that page on the occasion of this conversation with Mr. McGahan. A. I did not.

Q. Would your answer be the same with respect to page 3?

A. My answer would be the same for the whole set-up that you have there with the exception of that one page, a little bit on page 7 with reference to a few pumps.

Q. And, if, therefore, there were any words on these pages indicating that there was production equipment listed, would you say you did or did not see such words on the occasion of this conversation?

A. I did not see such words.

(Testimony of David Zeidenfeld.)

Q. So that, if at any time during your testimony you have said that these sheets were shown to you by Mr. McGahan, I now understand that they were not shown to you in the sense that you read them or looked at the contents of them, is that [284] correct? A. That is correct.

Q. On the day that you had this second conversation with Mr. McGahan, had you on this occasion gone down to see Mr. McGahan to discuss this deal or did you happen to be there on some other matters of business?

A. I was there on a routine call, the same as my first call.

Q. What did Mr. McGahan tell you in this conversation that Richfield wanted to sell?

A. He told me that they wanted to sell everything up—I believe he might have mentioned the word “Cas-malia” at that time but he said they wanted to sell the whole refinery up there complete. And he showed me this reference to the 1,500 tons that was up there but said not to use that figure as conclusive that there was 1,500 tons or more or less but for me to go up there and see what was there and to make my decision therefrom.

Q. Did he tell you that Richfield was or was not ready to accept bids on the property?

A. He told me that they would be ready to accept bids possibly in two or three weeks on this deal and it might be a pretty good idea to go up there and see what it was all about because I might have to make a few more trips after the first trip.

(Testimony of David Zeidenfeld.)

Q. Now, coming to the conversations that you had with [285] Mr. Morris Ferer, first, after the first conversation that you had with Mr. McGahan, will you please tell us when you had a conversation with Mr. Ferer about this matter first?

A. It was possibly the same evening or within a day or so after this discussion with Mr. McGahan. That is the first discussion.

Q. Where did that discussion take place?

A. Do you mean with Mr. McGahan?

Q. No; with Mr. Ferer.

A. In Mr. Ferer's office.

Q. Who was present?

A. Oh, there was always a few in the office and I presume there were a couple in the office with Mr. Ferer at the time. I don't recall just who was there.

Q. Will you give us that exact conversation as nearly as you can remember it?

A. As far as I can recall, I told Mr. Ferer that there was a deal coming up at Richfield. And Mr. Ferer told me, "Well, are they ready to shoot on the deal because we don't want to make any goose chase?" And I says, "I don't think it will really be a deal for a little while yet. It is just in real preliminary discussions." And he says, "Well, let me know when it comes up," and that was the end of it.

Q. And that was all that was said during that first discussion?

A. During that first discussion; yes. [286]

(Testimony of David Zeidenfeld.)

Q. The next time you discussed it with Mr. Ferer, I believe you said it was after your second talk with Mr. McGahan? A. That is right.

Q. A number of times during your direct examination you have said you might have said something to Mr. Ferer or you might not have. I want to ask you now directly whether or not you told Mr. Ferer that the deal which you were talking about was a refinery deal or a refinery and producing deal. What did you say about that to him, if anything?

A. If I told him anything about it, as far as I recall, I told him that there was a refinery deal for sale.

Mr. Paradise: I move to strike the answer, if the court please, on the ground that the witness has so qualified it that it indicates that he didn't make any such statement.

A. That was in the second discussion.

The Court: Mr. Reporter, will you read the question and the answer. And I wish you would listen carefully because I am going to ask you a question.

(Record read by reporter.)

The Court: Now, in your answer you said, "If I told him anything about it." Have you any recollection now of having any conversation with Mr. Morris Ferer concerning your second conversation with Mr. McGahan?

A. Well, my mind is a little hazy as to just exactly what was said. [287]

The Court: I am not asking you what was said. Did you talk to him at all and did you tell him you had had a talk with McGahan following your second conversation with McGahan?

(Testimony of David Zeidenfeld.)

A. I recollect saying something to Mr. Ferer but, to be specific as to exactly what I told him, I wouldn't want to swear to it.

The Court: All right. You do remember mentioning something to Mr. Morris Ferer about having a second conversation with McGahan?      A. That I recall.

The Court: And was that about a prospective sale of salvage by Richfield?

A. It was concerning that particular deal that this case is about.

The Court: Now, from that point on, as far as you can recall, and, if you can't remember the words, tell us the substance of anything else that you can remember of what you reported to Mr. Morris Ferer following that second conversation with McGahan about the sale of salvage at Casmalia.

A. I can't be too specific as to exactly what I told him because right after that I was shunted out of the whole deal and there was nothing asked of me because he and Mr. Clements had gone in on sort of a partnership arrangement on it. I don't know whether Mr. Clements had gone in with him prior to my second talk with Mr. McGahan or afterwards.

The Court: I am not asking you a thing about Clements or [288] about any partners. Now, we can save a lot of time, your time as well as ours, if you will listen to the questions and answer the questions and don't volunteer anything else. All we are trying to find out is what you can remember of your conversation with Mr. Morris Ferer concerning the Casmalia deal after the sec-

(Testimony of David Zeidenfeld.)

ond conversation that you had with McGahan on that subject. Now, do you remember anything that you told Morris Ferer?

A. I remember speaking to him about the deal but I can't be conclusive, to tell you exactly, what I might have said to him or even the substance of it. But we didn't sit down and really discuss this thing. It was just something that was brought up in an ordinary come and go proposition in the office. It was late when I came in and Mr. Ferer was ready to go home and nothing was really discussed about it.

The Court: Have you anything further?

Mr. Krasne: Yes, your Honor.

Q. As a matter of fact, Mr. Zeidenfeld, although you have been asked about discussions which you may have had with Mr. Ferer about this subject matter, isn't it true that all you ever did was to just casually refer to this deal to Mr. Ferer? A. That is right.

Q. You never did sit down and talk to him about any of the details of the deal? Isn't that the truth of the matter? A. That is right. [289]

Q. Did you know that Mr. Ferer was going up to look at the Casmalia property before he made a trip?

A. I did not.

Q. Did he tell you that he was going?

A. No; he did not.

Q. Did he discuss with you—strike that, please. Did you have any conversations with Mr. Ferer after he had returned from his trip to Casmalia?

A. I don't recall having anything much to do with that deal after he made the trip.

(Testimony of David Zeidenfeld.)

Q. After you had had these preliminary discussions, the two discussions with Mr. McGahan, did you thereafter carry on any of the negotiations for the purchase by Aaron Ferer & Sons of the Casmalia property from Richfield?      A. No; I did not.

Q. In other words, if I understand you correctly, after these two preliminary discussions which you happened to have with Mr. McGahan when you were there on other business, you never thereafter had anything whatsoever to do with the making of this deal, isn't that right?

A. That is right.

Mr. Krasne: That is all. [290]

Redirect Examination.

Q. By Mr. Paradise: Mr. Zeidenfeld, did Mr. McGahan ever mention the sum of \$20,000.00 to you?

A. Mr. McGahan?

Q. Yes?      A. I don't think he did.

Q. Did anyone else who was employed by the Richfield Oil Corporation ever mention the sum of \$20,000.00 or a sum of approximately \$20,000.00 to you in connection with this transaction?

A. It was never mentioned.

Q. When you say that you thought it would take \$20,000. to buy that equipment at Casmalia or that Richfield would sell it piecemeal, did any part of that information come to you either from Richfield, Mr. McGahan or anyone else connected with Richfield?

A. I wouldn't say directly that it did.



(Testimony of David Zeidenfeld.)

Q. Would you say indirectly that it did?

A. It might.

Q. I don't understand your answer, Mr. Zeidenfeld. Did you discuss it with anyone connected with Richfield or employed by Richfield?

A. Well, it is a hard question to answer. Or I might put it to you this way, that I spoke to Mr. McGahan concerning this deal, as to what it will take to buy it.

Q. Did you ask him that? [291]

A. And Mr. McGahan wouldn't give me any information. And you might call it a little wheedling that I did now and then and I didn't exactly get the amount that it would take from Mr. McGahan but I might have started at \$10,000.00 and \$15,000.00 and \$20,000.00, and I got a little better reply to the \$20,000.00 figure than I did to any other figure.

The Court: Let me interrupt here. Every so often you use an expression, "I might have said this" and "I might have asked that." What I am interested in knowing is not what you might have done but have you any recollection, hazy or otherwise, of discussing the subject matter of the possible figure that would have to be bid with Mr. McGahan? A. Yes.

The Court: All right. Now, tell us the extent to which you can remember what either you or McGahan said on that subject.

A. Well, in the course of conversation I tried to get a figure from him as to what it might take to buy the deal and Mr. McGahan didn't exactly come out with the exact amount as to what it would take; but I in my

(Testimony of David Zeidenfeld.)

own mind, after talking to him, surmised that the \$20,000.00 figure would be the amount the Richfield would take and that, otherwise, they would cut it up in piecemeal.

The Court: You say you surmised that in your own mind. What did he say that led you to surmise that?

A. He might have smiled at the time I made a price of [202] \$20,000.00 or asked him if it will take that amount. In going out and purchasing material of this type, you can usually determine from the person you call on as to how to go about getting information of that kind.

The Court: Yes; I have heard you tell us about what usually happens but I have to decide this case, including what weight is to be given to your testimony, and I am interested not in what generally happens but what you can remember actually happening in this particular transaction.

A. I will say this, that Mr. McGahan didn't give me any actual information of \$20,000.00; that as far as that figure is concerned I took it on myself. I will put it, to say that that will be the amount that will buy the deal from my discussions with Mr. McGahan, although he didn't give me the exact amount.

The Court: Do you remember telling that much to Mr. Morris Ferer after your second conversation with McGahan?

A. I wouldn't swear to it, that I told it to him, but I believe that I did.

## Testimony of David Zendenfeld.

The Court: Then, as I understand that you do recall that during your second conversation with Mr. Gahan on this subject you asked him how much it would take to buy this savings and Mr. Gahan declined to tell you, is that right? A: That is right.

The Court: And as you also recall that when you asked him whether any one of several different figures would get [243] the deal and that Mr. Gahan declined to answer but you thought he smiled when you mentioned the figure of \$20,000.00? A: That is right.

The Court: That is all.

Q: By Mr. Paradise: Mr. Zendenfeld, during your attention to both conversations you had with Mr. McGahan, both the one in September and the one at the end of November, to which you have testified, at either of those conversations did Mr. McGahan ever mention the phrase "producing equipment"?

A: He might have but I don't recall.

Q: Do you recall either that he did or did not?

A: I wouldn't want to say because it has been so long ago that I wouldn't want to go on record as saying that I do remember or don't remember because I don't.

Q: Then, it is vague in your mind whether he used that expression or not, is that correct?

A: That is right.

Q: Do I understand, then, that your answers to Mr. Krasne's statements or questions concerning a refinery deal—that that is not correct, is that true—that Mr. McGahan might have used the words "producing equipment" in addition to referring to the refinery?

(Testimony of David Zeidenfeld.)

A. It is pretty hard for me to answer whether he did or he didn't. All I can say is in my own mind I pictured it as a refinery, as being that type of a deal that it was.

Q. I am asking you for conversation. [294]

A. I thought it was a refinery deal all along and I don't recall him saying about producing equipment up there.

Q. Are you now changing your testimony and saying that you do recall that he did not use the words "producing equipment" at either of those two conversations?

A. I can't be too definite in giving an answer on that.

Q. I call your attention again to the deposition or the portion of the deposition which I read to you this morning, the question appearing on page 5, which refers to the first conversation you had with Mr. McGahan in September of 1940.

The Court: May I ask is this something that you have already asked the witness about?

Mr. Paradise: Yes, sir.

The Court: I don't see any occasion to go over it a second time.

Mr. Paradise: All right.

Q. By Mr. Paradise: You have mentioned these 10 pages that Mr. McGahan showed you during the last part of November. Did Mr. McGahan offer to let you read those pages?

A. As I recall it, he said, "Here, I have some pages," and he just fingered through these pages pretty fast, and I kept telling him that all I am interested in is how

(Testimony of David Zeidenfeld.)

many tons are in the deal. As far as offering to let me read them, if I had asked him for them, he probably would have let me read them.

Q. Were you looking at the pages with him? [295]

A. I was just looking at them as he thumbed through them pretty fast.

Q. Were you on the same side of the desk with him?

A. I walked around to the other side of the desk. He asked me to come around.

Q. Did you look at the pages as he turned them over?

A. As far as looking at them, I merely glanced at them, but I don't recall anything on the pages.

Mr. Paradise: That is all.

Mr. Krasne: That is all.

The Court: I would like to ask the witness this. While you were in the employ of the plaintiff, were there any occasions when you reported to your employer about a prospective deal on which you were personally not intending to bid but which you considered your employer might like to investigate to see whether a bid would be submitted?

A. There was only one occasion that I recall where a deal like that came up outside of this deal.

The Court: And what was that other occasion?

A. That was a deal on some cranes that the U. S. Engineering Department had for sale, and Mr. Ferer took that up by himself.

(Testimony of David Zeidenfeld.)

The Court: And do I understand that, except on the so-called Casmalia deal and this one with the U. S. Engineering Department, you submitted bids on all other deals with which you had anything to do while you were in the employ of the [296] plaintiff?

A. That is right. I can volunteer some information, if you want, as to the extent of my activities in detail.

The Court: No; I am not asking you for that. Before your deposition was taken in this case, did anyone talk to you about this transaction so far as what testimony you might be asked to give?

A. No. The only thing that happened before this deposition was that I got a call by Mr. McGahan that Richfield would like to have me give them a deposition. And then I was up to Mr. Paradise's office, I think, a day or so before the deposition and I told him at that time, "Being neutral in this thing, I would like to tell Mr. Ferer that I am going to give you a deposition, too," so that I could be neutral on both sides, as I was doing business with both parties. Now, being in business by myself, I do business with Mr. Ferer and sometimes with the Richfield Oil Corporation since this deal came up. So all during this case I have been trying to act as a neutral.

The Court: I haven't asked you that. I am merely trying to find out whether anybody spoke to you about this case before your deposition was taken. So far you have answered that one day Mr. McGahan called you up. Now, tell us again what that conversation was.

A. I was told Mr. Paradise wanted to see me in his office and I came up to Mr. Paradise and he asked me

(Testimony of David Zeidenfeld.)

[297] pertaining to what my conversations were or what my recollection was as to what I had to do with this deal; and I told him at that time that I wanted to see the other side and see what this was all about. This was really the first thing I heard about that there was a lawsuit going on and I went up to see Mr. Ferer about it.

The Court: Mr. Morris Ferer?

A. Morris Ferer. And I asked him about it and there was really nothing much said about the whole thing. There was nothing which would influence me one way or the other.

The Court: I haven't asked you that. Do I understand you to say, then, that the first you heard about this lawsuit was that one day Mr. McGahan telephoned you and asked you to go to the office of Mr. Paradise and tell Mr. Paradise what you knew about this transaction?

A. That is right.

The Court: Now, do I understand, before going to the office of Mr. Paradise, you told Mr. McGahan that you wanted to be neutral and, therefore, you wanted to talk to Mr. Morris Ferer before you gave your deposition?

A. Well, that was after I got to Paradise's office. I told Mr. Paradise that before I gave a deposition that I would rather they subpoenaed me and made me come in rather than voluntarily coming in to give a deposition.

The Court: Let's see if I now understand you. After McGahan asked you to come up to the office of Mr. Paradise, [298] you did go to that office?

A. Yes, sir.

(Testimony of David Zeidenfeld.)

The Court: And there you were questioned about what you knew of the so-called Casmalia deal?

A. That is right.

The Court: Did you answer those questions or did you say first that you wanted to inform Mr. Morris Ferer?

A. I answered the questions.

The Court: And then, while you were in the office of Mr. Paradise, did you make some statement to the effect that you were going to tell Mr. Morris Ferer what had taken place?      A. That is right.

The Court: And that you would rather that you be subpoenaed instead of you voluntarily coming up to give your deposition?      A. That is right.

The Court: Did you then go to see Mr. Morris Ferer?

A. I saw Mr. Ferer after that.

The Court: And did you see him before your deposition was taken in this case?      A. I believe I did.

The Court: Where?

A. I think I went up to Mr. Krasne's office and met Mr. Ferer there.

The Court: How did you learn that you were to meet Mr. Ferer at Mr. Krasne's office?

A. I think I phoned Mr. Ferer and told him and he said, [299] "It might be better if you come up to the attorney's office"; not that there were any questions asked of me very much but he wanted to see me up there.

The Court: So then you did meet Mr. Ferer at the office of Mr. Krasne?      A. That is right.



(Testimony of David Zeidenfeld.)

The Court: Then were some questions asked you there?

A. Well, not very much. They more or less asked me—or I voluntarily gave them an outline as to what had taken place up at Richfield.

The Court: Did anything else take place on that occasion?

A. That is as far as I know and I think the next day there was the deposition taken.

The Court: Since your deposition was taken, have you spoken to anyone about this case?

A. Since the deposition was taken, I spoke to Mr. Krasne pertaining to certain things in the deposition, as to what I meant.

The Court: Where did you speak to him?

A. I was up to his office.

The Court: How did you happen to go there?

A. Mr. Krasne called me up and asked me about it and I told him, "Well, I will come up and see you about it and look over it."

The Court: And then you went to his office and what took [300] place there?

A. Nothing. He asked me a few questions pertaining to something in a certain part of the deposition, where my questioning—or he tried to show me where my questioning as far as Mr. Paradise was concerned was in favor of Richfield; that where he asked me questions it was in favor of Richfield. And he asked me just what

(Testimony of David Zeidenfeld.)

I meant by it so that, when it comes before the court as it is here, I will have to give some conclusive point one way or the other on the thing. And I as much as told him that as far as I am concerned I only tell it the way I can and I would like to read that deposition over again and get an idea for myself what it is. But I didn't read that deposition since that time. I didn't read it all then.

The Court: Since that conversation that you have last mentioned, have you talked to anybody else about this case?      A. That is about all; nothing else.

The Court: I have no other questions.

Mr. Paradise: That is all.

Mr. Krasne: No other questions.

Mr. Paradise: Mr. Montgomery, please take the stand.

The Court: I think we will take a short recess, for five minutes.

(Short recess.) [301]

R. D. MONTGOMERY,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

A. R. D. Montgomery.

Direct Examination.

Q. By Mr. Paradise: You are now connected with the Richfield Oil Corporation, Mr. Montgomery?

A. I am.

Q. In what capacity?

A. I am manager of the production department.

(Testimony of R. D. Montgomery.)

Q. What are the functions of the production department, that is to say, what operations does it cover?

A. Drilling and producing oil wells.

Q. Would you state generally, Mr. Montgomery, your experience in the drilling and producing and operating of oil wells?

A. I first went into the oil fields in 1911 as a workman, operator, tool dresser, driller, pumper and gauger and kept in that oil business until date with three years' exception, when I was in the mining business, which I had previously studied for in school.

Q. At what school was that?

A. The University of California.

Q. Have you been employed by any other oil companies [302] other than the Richfield Oil Corporation?

A. Yes, sir.

Q. In connection with the drilling and producing of oil wells? A. Yes, sir.

Q. By what other companies?

A. The first years of my experience in the oil business I was employed by one or two small companies and thereafter by the Standard Oil Company for several years and then, for the last 16 years, by the Richfield Oil Company or its predecessor.

Q. While you were employed by the Standard Oil Company, was that in connection with the production and operation of oil wells?

A. It was. I was in the field both in the southern part of the State and the northern part of the State, and in South American countries I was in charge of all their developments down there, both drilling and producing.

(Testimony of R. D. Montgomery.)

Q. Prior to the time you were employed by Richfield Oil Corporation, were you employed by the receiver of Richfield Oil Company of California?      A. I was.

Q. In the same capacity you are now employed by the Richfield Oil Corporation?      A. Yes, sir.

Q. What was the period of that? [303]

A. 1931 to 1937.

Q. In 1931 was the date when the receiver was appointed, was it?      A. Yes, sir.

Q. Prior to that, were you employed by Richfield Oil Company of California?

A. Yes; I became connected with Richfield Oil Company of California in 1926.

Q. Are you familiar with the Casmalia oil field, the property owned by Richfield Oil Corporation?

A. I am.

Q. Do you know at what time or at what period the wells were drilled in that field?

A. They were drilled from 1917 to 1925, that is, drilled and produced.

Q. Do you know when production stopped of those wells?      A. In 1925.

Q. At that time, in 1925, when production stopped, do you know approximately the quantity of oil that was then being produced from those wells?

A. The records indicate that the wells had produced some 7,000,000 barrels of oil.

Mr. Sturzenacker: Just a minute. We move to strike the answer as not responsive to the question.

The Court: The answer may go out.

(Testimony of R. D. Montgomery.)

Q. By Mr. Paradise: Do you know, other than from your [304] recollection of the records, what the production was at that time?

The Court: May I inquire is there any difficulty here about that? This sounds to me like a preliminary question.

Mr. Paradise: Yes.

The Court: I gathered from discussion or comments made during the trial that all are agreed that this field at one time was in production of low grade oil over a period of years and that producing operations ceased some time about 1925 or 1926.

Mr. Paradise: Yes.

The Court: Do we need to spend any more time on that subject?

Mr. Paradise: No, if the court please; not on that phase of it. I was leading up to the point of the present productivity of the property; I mean the capabilities of producing.

Q. By Mr. Paradise: Do you know, Mr. Montgomery, at the time production stopped in 1925, whether the oil field under the Casmalia property was depleted?

Mr. Sturzenacker: Just a minute. That calls for a conclusion of the witness, for which he has not been qualified.

The Court: I think perhaps this observation may be of assistance. I think it is pertinent to inquire whether or not the producing department, if that is the proper term to use, of Richfield took a position one way or another

(Testimony of R. D. Montgomery.)

relative to the future possibilities of producing oil from this field, [305] regardless of whether their judgment was correct or not.

Q. By Mr. Paradise: In your opinion, Mr. Montgomery, has the field been depleted, fully depleted?

A. It has not.

Q. Do you know if there is any present production from the same oil pool?

A. There is production on properties adjacent to and alongside of this property that we are discussing.

Q. By what company?

A. Oliver C. Fields' Casmite Oil Company. It produces from 10 wells approximately 500 barrels a day at the present time.

Q. What was the first examination you made of the Casmalia property after becoming associated with the Richfield Oil Company?

A. I looked into the property for the purpose of resuming production.

Q. Will you state when that occurred?

A. In 1930. There were a great many obstacles to be cleared up and there were a great many changes to be made in the type of operation that I would propose as compared to the type of operation that had been going on on this property.

Q. What did your investigation consist of in 1930, Mr. Montgomery?

**No. 10743**

IN THE

**United States Circuit Court of Appeals**

FOR THE NINTH CIRCUIT

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Appellant,

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**VOLUME II.**

(Pages 465 to 942 Inclusive)

**TRANSCRIPT OF RECORD**

Upon Appeal from the District Court of the United States  
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**FILED**

JUL 15 1944

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CLERK





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(Testimony of R. D. Montgomery.)

The Court: I don't know that we need to go into those details. Do I understand that this witness is prepared to [306] testify as to what decision was reached by his employer or his department?

Mr. Paradise: Yes.

The Court: Relative to continuing or ceasing operations?

Mr. Paradise: Yes.

The Court: Let him answer that.

Q. By Mr. Paradise: I would like to call your attention, Mr. Montgomery, to the removal of the derricks and tubing and rods from the wells at Casmalia. Do you know when that occurred?

A. It was in the early part of 1940.

Q. Was that work done on your instructions?

A. It was.

Q. To whom did you give those instructions?

A. I gave instructions to the purchasing department, to Mr. Kelly, to seek a suitable contract for the removal of the derricks, tubing and rods, on that part of the property. It had been reported to me by our watchman up there and I had observed that these derricks, having been there for many years, were toppling over and were in a very hazardous shape. And, inasmuch as we would not use the derricks in a future proposed plan of operation, and inasmuch as we felt that those rods and tubing that were in the wells were in a very hazardous or precarious condition, as that is very corrosive oil and water in those wells, and that they might damage the wells, I ordered them all cleaned up at that time. [307]

(Testimony of R. D. Montgomery.)

Q. Did you give any instructions to Mr. Kelly at that time in connection with the casing in the wells?

A. I gave him definite instructions not to have the casing tampered with at all.

Q. Did you give Mr. Kelly any instructions concerning fishing operations on those wells at the time of the removal of the tubing or rods?

A. I instructed him that in this operation, if the contractor found any tubing parted or stuck in the hole, he was not to fish it out as I did not want that casing disturbed.

Q. Will you explain to the court the difference between tubing and casing in an oil well?

A. Casing is run into an oil well to prevent the formation from caving into the cased hole. Tubing is run into an oil well for the purpose of permitting the hydrocarbons to be either pumped or to flow through the tubing.

Q. Is there any difference, Mr. Montgomery, in the manner in which tubing and casing are installed in oil wells?

A. Yes. There are two different ways of drilling oil wells, two common and different ways. One is what they call cable tools, which was the method used in this field. As you drill with cable tools, you carry your casing right along with your tools to prevent the formation from falling in on your tools and damaging them. The other method of drilling is what is called rotary, which we need not go into, I suppose, [308] as it is in common use now. Casing is used then after the rotary drills the hole and you set casing in there to prevent the same thing, that

(Testimony of R. D. Montgomery.)

is, formations from coming into the hole and to exclude the water that is back of these formations from entering into the oil sands.

Q. My question was concerning the difference in the installation in the well between casing and tubing. Are they attached to the ground in any different manner?

A. Oh, yes; a casing, as I attempted to explain, is landed and cemented upon the completion of your drilling, at which time, after cleaning out inside of the casing, you run tubing inside, under a different hookup entirely, for the purpose of producing the oil if it is there.

Q. Is it easier to remove casing from a well than tubing, or the reverse, whichever the case may be?

A. The tubing is far easier to remove.

Q. Is the tubing cemented in the well?

A. Never.

Q. Mr. Montgomery, do you attend any of the executive meetings of Richfield? A. I do.

Q. How regularly are those meetings held?

A. Once a week.

Q. What persons are present at those meetings?

A. The president of the company and its executive heads.

Q. Do you recall any discussion of the matter of [309] the removal of the tubing or rods from the wells at Cas-malia prior to the time when those items of equipment were removed? A. I do.

(Testimony of R. D. Montgomery.)

Q. Did you make any recommendations to the executive meeting at that time?

A. I recommended, because of the precarious state in which these derricks were and the damage that this tubing which had been standing there for a great many years might cause to the wells, that, if we could get an operator to take this out on a satisfactory basis, we should do so because they wouldn't use that type of structure in future operations.

Q. When you say that type of structure, do you mean the tubing and rods?

A. Tubing and rods and derricks and the whole surface setup.

Q. At the occasion of that meeting, did you make any recommendation concerning any future operation of those wells for the production of oil?

A. During the time that we were discussing this tubing?

Q. Yes.            A. Yes.

Q. Will you state what recommendation you made at that time?

A. I recommended that neither the tubing, the rods, nor the derricks, would be required in our proposed future type [310] of operation, that is, the particular tubing and rods that were then in the wells, and that the property to my mind presented good opportunities for operation, profitable operation. And with that in mind I was ordered to go ahead and have this stuff removed.

The Court: May I have that answer read?

(Answer read by reporter.)

(Testimony of R. D. Montgomery.)

Q. By Mr. Paradise: At that time did you make any recommendation concerning the abandonment of the wells, Mr. Montgomery? A. No, sir.

Q. Was there any discussion concerning the abandonment of the wells? A. No, sir.

Q. Had you desired to have the wells abandoned or the casing removed from the wells, could it have been done as a part of the same operation, of removing the tubing and rods and derricks? A. Very readily.

Q. Did you state at that meeting the manner in which you proposed to operate the property for future production?

A. This is prior to pulling the tubing, is it?

Q. Yes.

A. Well, I stated that we were working on the problem; that we had some definite ideas in mind and that, inasmuch as our ideas would not use this equipment that we were [311] discussing, it was decided to remove it.

Q. Calling your attention or directing your attention to the fall of 1940, do you recall any conversation at any of the executive meetings that occurred at that time, concerning the sale of salvage equipment at Casmalia?

A. Yes, sir.

Q. Do you recall about when that occurred?

A. It was in the fall of 1940, September or October or about in there.

Q. When did that proposed sale first come to your attention? Was it at that meeting or on another occasion?

(Testimony of R. D. Montgomery.)

A. Mr. Kelly of the purchasing department called me up in about September, 1940, and told me that the refining group was going to sell what they called refining equipment up there, and did we wish to sell our equipment that we would not use in our future operations. And he recommended that it would be a good time to make a combination sale of this stuff. I agreed with him and that was the initial starting of this sale of equipment, of our equipment.

The Court: May I interrupt to ask the reporter to read that answer?

(Answer read by reporter.)

Q. By Mr. Paradise: In your conversation with Mr. Kelly, did either you or he describe the nature of the equipment that was to be sold?

A. Well, we had a general conversation on the type of [312] equipment that the production department would dispose of. And my only thought was not to disturb the oil wells. The rest of the equipment was not of particular interest to production in our proposed plans for future operation.

Mr. Sturzenacker: I move that portion of the answer beginning with "my only thought" be stricken out.

The Court: Yes; that may go out.

Q. By Mr. Paradise: Did you mention to Mr. Kelly at that time anything about the oil wells as a part of that conversation?      A. I can't say that I did.



(Testimony of R. D. Montgomery.)

Q. Did this second meeting of the executive committee which you have referred to occur before or after this conversation with Mr. Kelly?

A. That occurred after.

Q. Did you make any recommendations at that time concerning the sale of the proposed salvage?

A. Yes. At these so-called executive meetings the refinery representative was there and he discussed with the management that he proposed to sell this refining equipment and I discussed with the management that I proposed to sell at the same time this surface or production equipment that we would not need in future operations of the property or would not require, making a combination sale of the material there that neither of us would require.

Q. Did you state at that time why you would not require [313] the equipment that you have mentioned?

A. Yes. I told the management that this equipment that I had in mind to dispose of did not fit into our scheme of future operations; that it had laid there for many years and probably had deteriorated beyond a point that it would do us any good and that our proposed operations did not call for an alignment of the pipelines nor did we intend to use the boilers which were scattered all over the place nor did we intend to use these old tanks which were in locations that would not be useful for our proposed operations and, all in all, as far as I was concerned I would just as leave get rid of all of that type of equipment.

(Testimony of R. D. Montgomery.)

Q. Did you mention anything about the pipelines?

A. The gathering lines on the lease?

Q. Yes.

A. Yes; that was part of this sale. They were of very old age and were not lined up to suit our proposed type of operation.

Q. Had you examined the condition of the equipment that was then being sold, that is to say, were you familiar with it?

A. I was familiar with it. I had made trips to the field there.

Q. Was it your opinion that any part of that could have been used in connection with future operations?

A. Well, possibly some of the pipe, by taking it out of [314] the ground or removing it from its then location and testing it and making various tests on the pipe, might have been used again.

Q. I meant in its condition at that time, in its location and condition at that time, Mr. Montgomery.

A. No; it was not adaptable for my plans at all.

Q. Did you describe to the management at that time the nature of your proposed operation and the manner of it?

A. I did.

Q. Will you state what recommendation you made at that time?

Mr. Sturzenacker: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

(Testimony of R. D. Montgomery.)

A. I explained to the management that here was a property that, to the best of my knowledge, had several million barrels of oil in it and it had been shut down in 1925 due to the fact that they couldn't operate it at a profit and that the reason that they couldn't operate it at a profit was they were using old, obsolete pumping equipment and were pumping these wells with steam. They were injecting at times in some of the wells distillate to lift this heavy oil and they were driving it down to this great mass of refining equipment, at which time they distilled this distillate off. And that was also used for the purpose of breaking the viscosity of this oil to get it into a pipeline. It was very heavy oil. All [315] of which increased operating costs at that time and all of which could be improved with today's methods of operation. We would use no steam and we would use gas engines or pumping jacks that would be engined with gas engines. This breaking machinery, in lieu of the so-called refining machinery that they had up there, is a very compact piece of equipment today as compared to the days they used it, all of which was explained to the management not only at that time but many times.

Q. By Mr. Paradise: Did you give any instructions to Mr. Harold Davis concerning the sale of the salvage equipment?

A. I can't recall. I generally had my conversation with Mr. Kelly.

Q. Did you give any instructions, either to Mr. Davis or to Mr. Kelly or to anyone else, in connection with a sale concerning the six large storage tanks on the property?

A. Yes. I wanted those reserved.

(Testimony of R. D. Montgomery.)

Q. To whom did you give those instructions? Do you recall?

A. It was either Mr. Kelly or Mr. Davis. Mr. Davis, as you know, handles some of these matters for Mr. Kelly but I generally talked to Mr. Kelly, but I might have talked to Mr. Davis.

Q. Do you recall whether you stated what the reasons were for the reservation and exclusion of those tanks?

A. These are very large tanks and they happened to be in [316] fairly good physical shape and some of them had some oil in them and we wanted to use these tanks for our storage and production when we resumed operations up there. Otherwise, we would have had to replace them and it seemed foolish to do that.

Q. At the time this contract was made, did Richfield or the production department have in its possession a set of the logs and well histories?

A. At the time of which contract?

Q. The contract with Aaron Ferer & Sons, that is to say, during January of 1941 and prior to that time.

A. Did we have what?

Q. Did you have in your possession copies of the logs and histories of the wells?

A. Oh, yes; we had all of the logs and histories of every well that had ever been drilled there.

Q. Are those the same logs and histories, copies of which were stored on the lease?

A. I believe they were.

(Testimony of R. D. Montgomery.)

Q. Do you still have those in your possession, that is to say, in Richfield's possession?

A. The logs and histories?

Q. Yes. A. Yes; we have.

Q. Was it ever your intention, Mr. Montgomery, at any time during the negotiation of this contract with Aaron [317] Ferer & Sons and up to and including the date of the execution of that contract, on or about January 17, 1941, that the wells be abandoned, any of the oil wells on the property, or that any of the casing be removed from those wells? A. Never.

Q. Did Mr. Kelly ask you for your approval of that contract prior to the execution of it?

A. Yes, sir. I always approve those types of contracts or look them over for approval.

Q. When you say those types of contracts, what types of contracts do you mean?

A. Anything that has to do with the production department.

Q. Would you have approved that contract had there been any provision in the contract for the abandonment of the wells or the removal of any of the casing from the wells? A. No, sir.

Mr. Sturzenacker: Just a minute. I object to that as calling for a conclusion of the witness. It is strictly dealing in the realm of hearsay.

(Testimony of R. D. Montgomery.)

The Court: It seems to me this question is analogous to the one that we had before us earlier in the trial, on which one side has submitted citations and the other side was given the opportunity to do so, in support of a motion to strike. Overruled.

Mr. Krasne: I understand our motion or objection may be [318] deemed made to this entire line of questions and, if before this case is concluded it is determined it is improper to go into this line of questions, this objection will go to all of this line of testimony, without having to make repeated objections?

The Court: In other words, you have the privilege of making your motion with supporting authorities which will cover questions such as the one now being objected to.

Mr. Paradise: Will the reporter read the last question, please?

Mr. Krasne: He answered it already, I believe.

A. Yes.

(Record read by reporter.)

Q. By Mr. Paradise: If it had been your intention, Mr. Montgomery, to provide for and permit the abandonment of the wells and the removal of any of the casing from the wells, would you have approved the contract unless it had stated the particular manner of abandonment?      A. No.

Q. Has your department, or have you as manager of your department, instructed the purchasing department with respect to contracts for the abandonment of oil wells?

(Testimony of R. D. Montgomery.)

Mr. Krasne: We object to that on the ground it is incompetent, irrelevant and immaterial. It does not change this particular transaction.

The Court: Will you read the question? [319]

(Question read by reporter.)

The Court: I think that question is open to the objection which is raised.

Q. By Mr. Paradise: With respect to wells which your department desires to have abandoned, Mr. Montgomery, is it important to you as to the manner in which the wells are abandoned? A. Very important.

Q. In what respect?

Mr. Sturzenacker: We object to that as incompetent, irrelevant and immaterial.

The Court: I think I will hear the answer. I am not sure whether it should stay, but it is not clear in my mind just what is involved here in this question. You may answer.

A. May I have that again?

(Question read by reporter.)

The Court: And read the preceding question and answer.

(Record read by reporter.)

A. Well, I have tried to describe what casing is for in a well and it is cemented above the oil sands usually to keep the water from getting into the oil sands. Certainly, if this casing is to be pulled out of a well and the well abandoned and this casing removed, and we have other wells, or, rather, neighbors have other wells in the vicinity

(Testimony of R. D. Montgomery.)

of this well, you certainly want to be very careful that in abandoning this well you are not going to damage the next one. [320] That is one of the fundamental requirements and one of the reasons that we have a State Mining Bureau. They won't permit you to do such a thing without strict observation or precautions.

Q. By Mr. Paradise: In so far as the abandonment of any of the Richfield wells in the Casmalia field is concerned, would you have been satisfied merely to permit a contractor if you wanted him to abandon wells, to conform to the Mining Division's requirements or would you have imposed additional obligations with reference to the abandonment?

Mr. Sturzenacker: I object to that as incompetent, irrelevant and immaterial.

The Court: I think that is rather speculative but I would like to have something here cleared up at least in my own mind. Do I understand that by the removal of casing from a well in connection with the abandonment thereof there is some risk or danger that damage may be done to wells in an adjoining field?

A. Possibly not in an adjoining field, Your Honor, but in the same producing horizons in that same field there could definitely be damage done.

The Court: Perhaps I didn't use the right expression. Damage might result to wells in an adjoining property?

A. Yes; definitely.

The Court: What is that risk or danger? What does it consist of? [321]



(Testimony of R. D. Montgomery.)

A. Largely in the infiltration of these surface waters into producing oil sands, which are very damaging. They drown the sand and they make it no longer profitable to produce for oil. And it is the possibility of that water getting into those sands that one has to be careful of in abandoning operations.

The Court: With reference to the prior objection, of which I expressed some doubt, the objection is overruled.

Mr. Paradise: You may cross examine.

Cross-Examination.

Q. By Mr. Sturzenacker: Mr. Montgomery, the contract which you saw provided that the abandonment and the removal of this property should in accordance with all of the rules and regulations and laws and so forth, did it not?

Mr. Paradise: I object to the question on the ground it is not clear and that it assumes that the contract uses the word "abandonment."

Mr. Sturzenacker: I will withdraw the question.

Q. You know that this contract provides that in wrecking the equipment or in removing the refining and producing equipment sold to Aaron Ferer & Sons under this contract, the contract agreed to remove it in accordance with the various laws and rules and regulations, did it not?

A. That is right. He had to leave that property in good, clean, satisfactory shape. [322]

Q. And you saw that in the contract, didn't you?

A. Yes.

(Testimony of R. D. Montgomery.)

Q. You also saw in the contract that Richfield was selling Aaron Ferer & Sons everything on the property of the producing and refining equipment, didn't you?

A. That may have been in the contract but that is not what I had in mind when my instructions as to what we were going to sell were given.

Q. After reading that contract—or I will ask you this question. How soon after that contract was signed was it before you read that contract or had it given to you for your approval or was it approved by you before it was signed?

A. It was read and approved by me before it was signed, that is, by our people

Q. Did you call anybody's attention to the fact that in your mind you were only selling the surface producing equipment and not selling all of the producing equipment on that property?

A. I had laid down to the man that negotiated the contract or negotiated the sale of this stuff the type of equipment in so far as the production department was concerned and in so far as I was authorized from my management as to the type of equipment that was to be sold. Now, what wording he used in that contract—those little bits of words probably I wouldn't know and you just wouldn't look at it very close. If that answers your question, that is about the way [323] I sized it up.

Mr. Sturzenacker: Will you read the question?

(Question read by reporter.)

A. I will have to hear that again, please.

Mr. Sturzenacker: All right.

(Question re-read by reporter.)

(Testimony of R. D. Montgomery.)

A. I had already called the people's attention that were negotiating this deal to that fact.

Q. So that, if this contract was executed by Mr. Kelly on behalf of Richfield, selling all of the producing and refining equipment on that Casmalia lease, it was in direct contradiction to your instructions?

A. That is right.

Mr. Paradise: I object to the question and move that the answer be stricken, if the court please. I believe that it implies an entirely different construction of the phrase than the witness has in mind and that the question calls for a conclusion with respect to a particular phrase to which the witness' attention has not even been directed.

The Court: It seems to me the question undertakes to argue with the witness what the phraseology means. If you wish to interrogate the witness relative to the use of certain phraseology in the contract, I think you ought to call his specific attention to it; but what its legal effect is I don't think can be made the subject matter of a question. The answer will go out. [324]

Q. By Mr. Sturzenacker: Are you familiar with the tubing that was in these wells at Casmalia prior to the time that Mr. Anderson removed it?

A. How can you be familiar with tubing? I had a record of what the tubing consisted of.

Q. Did you ever see it? A. No, sir.

Q. Do you know what kind of tubing it was?

A. Yes, sir.

(Testimony of R. D. Montgomery.)

Q. What kind was it?

A. Lapweld tubing, a very obsolete oldfashioned type of tubing, according to the records of the Pan American, and that is what we bought from the Pan American.

Q. It is sometimes described as casing, isn't it?

A. Tubing?

Q. This tubing that was in this well.

A. I wouldn't describe it as casing.

Q. I show you a contract, marked Defendant's Exhibit A, between the Richfield Oil Corporation and W. R. Anderson, dated the 12th day of March, 1940, and ask you if you are familiar with this contract?

A. Yes. I authorized that contract.

Q. I will call your attention to page 4 of that contract and to paragraph (d), which apparently is an index or a digest of what was on the property. Calling your attention to "Well No." and "Tubing" and immediately under that, under the first [325] line, "1 4-3/4" lapweld casing, approx. 960' ", was that casing or was that tubing?

A. That could have been casing. Casing could be used as tubing in a well. I have tried to explain the difference between casing and tubing. There is such a piece of equipment in the oil business as 4-3/4 inch lapweld casing and that same descriptive equipment could be used for tubing.

Q. As a matter of fact, most of that tubing in those various wells was lapweld casing, wasn't it?

A. It is so called here, and for its use to lift oil I thought I explained that was tubing. I don't see any difference there.

(Testimony of R. D. Montgomery.)

Q. Is there any difference between that casing which was used as tubing and the casing which was used or the pipe that was used for casing in the well?

A. Any difference?

Q. Yes.

A. Well, I explained that casing in a well is put in there and it is usually cemented in place to hold the formations from coming in, and tubing is inserted inside of the casing to permit the oil to be pumped out.

Q. That is the function for which you use it. Now, was there any difference in the composition of the pipe?

A. Yes; the casing in the well is generally a much heavier, thicker type of pipe than tubing.

Q. Well, was this casing in the well heavier than the [326] tubing?

A. I would have to see the casing specifications. I don't see any specifications on this. It says "4-3/4" lap-weld casing." That is no specification. I can't answer your question.

Q. You say that you pulled out this tubing or this casing that was used as tubing because it was corroding?

A. That is what we thought.

Q. Was the casing corroding, too?

A. We thought it possibly was; yes, maybe not to the extent of the tubing because there is only one surface of the casing exposed to this sulphuric fluid in there.

Q. As a matter of fact, that oil has a high sulphur content and is very corrosive, isn't it?

A. That is right.

(Testimony of R. D. Montgomery.)

Q. As a matter of fact, it is your opinion that that casing is of very little value in the well, is it not, because of this corrosive effect that the oil has upon it?

A. Well, at least in so far as we know and we went into these wells after this tubing was pulled out. Whether that casing is the last word in casing or not, we know it is holding those formations back because we ran some instruments in there and got close proximity to the bottom in most of those wells.

Q. Did you ever examine the tanks that were on these premises? [327]

A. I have seen them.

Q. You have never examined them?

A. I haven't tested the thickness of them or looked at the specifications of the tanks.

Q. Do you know whether they were full or were partially filled with oil?

A. I had a pretty fair knowledge of it.

Q. What was that condition?

A. Are you speaking of the large tanks or all of the tanks?

Q. All of them.

A. Some of them had oil in them and some of them had what is called tank bottoms in them.

Q. You heard Mr. McGahan testify this morning that the only oil which was in the tanks was tank bottoms, didn't you?

A. I wasn't here then.

Q. Oh, that is right. As to these various gathering lines that went from the various wells to the storage tanks, in what condition were they?

(Testimony of R. D. Montgomery.)

A. I assumed, due to their age, that they were in very poor condition. I didn't see them after they were pulled out and I don't know.

Q. When was the first time that the Richfield Company decided to reopen this field and reproduce oil from this field?

A. Shortly after the acquisition of this property by the [328] old Richfield Company.

Q. And that was when?

A. It was acquired in 1929 and we were thinking of operating it in 1930 but we went into receivership in 1931 and we stood dormant for six or seven years and couldn't do anything.

Q. All of the activity that has taken place in relation to this field, with the exception of the time you were in receivership, has been with the idea in mind of reopening this field, is that right?

A. We have always had that in mind and we have it in mind right now, sir. There is a very great demand and it is becoming increasingly more for this type of oil.

Q. As an actual fact, since the manufacture or the discovery or use of high octane gasoline, this field has become somewhat valuable, is that not right, or oil of this class has become valuable?

A. Since the discovery of what?

Q. The use of high octane gas or aviation gas.

A. I see no connection.

(Testimony of R. D. Montgomery.)

Q. In other words, there is nothing has developed in the oil business in the last few years that has caused Richfield to want to produce its low gravity oil when they didn't produce it before?      A. There certainly has.

Q. What is that? [329]

A. There is an increasing, an ever increasing, demand for the type of asphalt and road oil that this field produces. It is quite a paramount issue today to get asphalt to feed defense industries.

Q. What one thing, if any, has Richfield done since they have owned this field, since 1920 or whenever you acquired it, to date—I will withdraw the question. Has anything been done since Richfield has owned this property leading up to the reopening of this field for the production of oil?

A. We have made a constant study of this problem and we have made reports on it and we have brought our management up to the field with the thought of not only opening this field but also adjacent fields we had an interest in up in that part of the country.

Q. Outside of studying and giving reports to your officials, has anything been done in regard to the physical work of reopening these fields or this field?

A. The very things you are talking about. Cleaning up this debris around here I would call a start in the operations of our proposed work.

Q. You are familiar with this contract, are you not, Plaintiff's Exhibit No. 4, the contract between the Richfield Oil Company and Aaron Ferer & Sons?

A. Yes.



(Testimony of R. D. Montgomery.)

Q. And you are familiar with the map that is attached to it? [330] A. Yes, sir.

Q. This contract provides for the removal of a pipeline to a loading platform some distance away, does it not? A. I believe it does.

Q. Was that necessary or in line with your idea of reopening this field for the production of oil?

A. That is one of the things that holds us back, is the fact that heretofore in some measure that oil has gone out by either railroad transportation or truck transportation and the freight rate out of that country is prohibitive. And in opening it up, we had no idea of shipping oil out in that manner. So that the pipeline to the railroad loading rack had no bearing on our future operations.

Q. You are familiar with the clause in the contract, and I am looking for it as I go along, on page 4, where it says, "In addition, buyer shall install a barbed wire fence adequate for the protection of cattle around two large sumps on the north side of the creek"? Was the protection of the sumps from cattle necessary or in line with your idea of opening up the field for the production of oil?

A. We had existing surface leases on that property and we had to protect the cattle from falling into sump holes. That has nothing to do with the operations of the field, I grant you.

Q. As a matter of fact, that surface lease for the running of cattle had been in existence for several years, [331] had it not? A. I believe it has.

(Testimony of R. D. Montgomery.)

Q. As a matter of fact, since the contract with Aaron Ferer & Sons was signed, you have re-leased the property for that same purpose for another five years, haven't you?

A. No, sir. I can correct you if you want me to. We have re-leased the surface rights of the property but not for the purpose of running cattle on it.

Q. What are the surface rights for, then? Is it farming?

A. Farming beans on a year to year basis. Well, I believe it is a five-year term for certain things.

Q. Were you familiar with this map that is attached to the contract before the execution of the contract?

A. Oh, yes.

Q. And you are familiar with those portions that are circled in red as excluded items?

A. I would have to see the map again to refresh my memory. What is the question?

Mr. Sturzenacker: Will you read the question?

(Question read by reporter.)

A. These tanks?

Q. The tanks and other things.

A. Yes; I am familiar with them.

Q. Did you cause that exclusion to be made or those red marks to be made on there?

A. It undoubtedly originated from my first discussions [332] with Mr. Kelly of what we in so far as the production department is concerned wanted and in so far as we were authorized and would sell.

(Testimony of R. D. Montgomery.)

Q. Are there any of the wells circled in red there?

A. Well, this is a surface map. This is not a well map. This is a surface equipment map.

Q. It shows wells on there, does it not?

A. It shows the location of wells but it doesn't show the subsurface of wells. That is not this kind of a map at all.

Q. Are there any red marks around those wells?

Mr. Paradise: The map speaks for itself.

A. The map is here and I see no marks on it.

Q. By Mr. Sturzenacker: Are any of the wells circled in red there?

A. From a first glance, I see no dots on this map that represent the surface locations of wells, certainly.

Q. How many acres are there in this property? Do you know?      A. 400.

Q. Let me call your attention to the first paragraph of the contract.

A. Are you through with the map?

Q. I think so. After the description and on page 2, I call your attention to these words, "Seller covenants and agrees to sell to buyer, subject to the exceptions hereinafter [333] provided, all of the equipment and facilities now located on said land above described, together with pipelines running from said land to a point adjacent to the railroad track one-half mile west of said land." Were you familiar with the terms of that contract when you authorized it to be signed?

(Testimony of R. D. Montgomery.)

A. I was familiar with what I authorized Mr. Kelly to negotiate on.

Q. After the Anderson contract had been completed and contemplating the Aaron Ferer & Sons contract to be completed, what producing equipment would remain on the property?

Mr. Paradise: I don't understand the question.

The Court: Will you read it?

(Question read by reporter.)

Mr. Paradise: I submit that the question is not clear, if the court please.

Mr. Sturzenacker: If it is not, I will withdraw it.

The Court: I am wondering if that question does not invite a controversy as to what counsel, on the one hand, would conclude would remain and what the witness might conclude would remain.

Mr. Sturzenacker: I meant physically, Your Honor. I will withdraw that question.

Q. Anderson completed his contract, did he not?

A. That is right.

Q. And, under your intention and instructions to Mr. Kelly as to what would be sold to Aaron Ferer, what then, if [334] anything, would remain on the property to be used in the producing of the wells on the property?

A. A few large tanks and these appurtenances wouldn't be directly used as production equipment but they were useful. We reserved a house up there and we reserved some gas lines going into this house so our watchman might have some gas and maybe a few other little incidents.

(Testimony of R. D. Montgomery.)

Q. Anything else?

A. Well, we certainly had no mind of letting the casing in the ground go, but I don't call that producing equipment.

Q. Is that necessary in a well in order to produce it?

A. Casing in the ground?

Q. Yes. A. Oh, yes.

Q. Speaking of the things that you did exempt, there was an oil house or office on the premises, wasn't there?

A. Yes. We exempted that and a garage, or whatever it was.

Q. Do you know the place where they kept the drillers' log books? A. I found it out afterwards.

Q. That was sold, wasn't it?

A. I don't recall.

Q. Those log books are not in your possession, as a matter of fact, are they?

A. No. But I wouldn't have sold them if I had known [335] they were up there.

Q. Except those which I delivered to your office one day, the majority of them are not in your possession, are they?

A. You understand, when a driller makes a log, he makes a duplicate copy and sends one to his home office and keeps one on the derrick floor. I have explained we have a duplicate copy of the logs you are talking about.

Mr. Sturzenacker: That is all.

(Testimony of R. D. Montgomery.)

The Court: May I interrupt to ask the witness did I understand you to say in answering one of the questions propounded to you on cross examination that the casing in a well, that is to say, the casing which is installed to protect the well from the infiltration of a foreign substance, is not producing equipment?

A. Well, Your Honor, it is a broad term. Some people would consider it producing equipment and some people call it subsurface equipment. It is certainly used in the production of the well and it is used to keep the formations from caving in.

The Court: Is it called any other type of equipment?

A. It is called generally subsurface equipment, Your Honor, that is, the casing is called subsurface equipment.

The Court: Do you mean that in your business a distinction is drawn between the term "producing equipment" and the casing that is installed in a well? [336]

A. Yes; there is that general distinction.

The Court: Is that distinction well recognized?

A. I believe it is. Yes; it is. I could explain in a very few words to you about what that distinction is.

The Court: Yes. What is it?

A. You drill the well and you case it and, if you are successful in obtaining the oil you are looking for, then you install what is called producing equipment which consists of tubing and rods and pumping equipment, tubes and tanks and such as that, in a brief way.

The Court: I am afraid that we will have to take an adjournment at this hour. How much further have you?

(Testimony of R. D. Montgomery.)

Mr. Paradise: I don't think I will take over five minutes, if the court please.

The Court: I wish we could be sure that it will not be over five minutes.

Mr. Sturzenacker: We are through, your Honor.

Mr. Paradise: I think there are only four or five questions, if the court please.

The Court: Very well; we will see. [337]

Redirect Examination.

Q. By Mr. Paradise: You testified on cross-examination, Mr. Montgomery, concerning a surface lease. Do the operations of the surface lessee tend to interfere with or prevent your operating those oil wells for the production of oil?

A. None whatsoever. It is specifically precluded from such interference.

Q. Mr. Sturzenacker asked you if Richfield during the past few years had done anything leading up to the opening of that field for production. Did the Anderson contract have anything to do with that?

A. That was a part of it. That was one step in getting rid of some equipment that we would no longer require for our proposed plans of production.

Q. Was that your purpose in instructing that that contract be made?

A. That was one of our purposes.

Q. At the time you approved the contract with Aaron Ferer & Sons, did you understand that the equipment covered by that contract and that was to be sold was limited to surface equipment?

(Testimony of R. D. Montgomery.)

A. Well, I rather described it as equipment that we no longer would require in our operations. Now, I have just explained to the Judge, or attempted to, production equipment and surface equipment and they are rather inter-allied.

Q. Did you understand that that contract covered any [337a] subsurface equipment at the time you approved it?

A. I did not.

Mr. Paradise: That is all.

Mr. Sturzenacker: No questions.

The Court: That is all. Now, as I understand it, this concludes the introduction of evidence so far as the defendant is concerned?

Mr. Paradise: Yes.

The Court: I think a fair way of handling this matter would be to require the presentation of briefs and, along with the filing of briefs, that a time be fixed within which the plaintiff may outline what additional evidence it would expect to offer upon resuming the trial. In other words, we have in evidence the depositions of Mr. Ferer—I have forgotten his initials.

Mr. Krasne: Morris Ferer.

The Court: Morris Ferer and Mr. Clements.

Mr. Sturzenacker: Yes, your Honor.

The Court: And I think a time should be fixed within which the plaintiff will indicate in outline form the character of additional evidence that the plaintiff will wish to introduce because, if it should develop that the plaintiff does not intend to offer any further evidence, there



(Testimony of R. D. Montgomery.)

would be no occasion to resume the trial. It occurs to me that 30 days ought to be ample time within which the plaintiff can reach that conclusion. [338]

Mr. Krasne: I think so.

Mr. Sturzenacker: May it please the court, may we make this inquiry? Naturally, if the plaintiff is going to proceed with the case in general, in addition to the testimony that will be necessary to refute or meet the affirmative defense of the defendant on the reformation of the contract, in order to sustain a judgment, we, naturally, would have to go into the element of damages.

The Court: That, I think, we agreed the plaintiff might withhold until the question of liability was determined.

Mr. Sturzenacker: Then, with that understanding, 30 days will be plenty of time to outline to the court any additional evidence we wish to present to this court in defense of the question of reformation of the contract.

Mr. Krasne: There would be only one item that we might be in the dark about, that we might not be able to pre-determine as to the nature of our testimony. As we started this phase of the trial, Mr. Paradise indicated to the court that he had some defenses in mind to the plaintiff's case, I gathered, other than interpretation of written contract No. 1 and other than the matter of reformation; and, naturally, we can't guess all of the things he has in mind in outlining the nature of additional testimony that we might have to present.

Mr. Paradise: That is not correct, if the court please. My only statement in connection with the plaintiff's [339] complaint and the defendant's answer was that

(Testimony of R. D. Montgomery.)

that also involves the construction of the contract, and all of the evidence and testimony, both by deposition and before the court, is equally admissible on both issues. The defendant has denied the plaintiff has performed the contract but, under a separate agreement, the defendant has not raised this lack of performance as a part of its defense of this case.

Mr. Krasne: That clarifies that.

The Court: Yes; I gather that the evidence that is now before us is to be considered both on the question of the plaintiff's case in chief, in other words, what the circumstances leading up to and attending the execution of this contract may be which may throw light on what it fairly means, and, secondly, the evidence which has been offered respecting the affirmative relief by way of reformation which the defendant seeks. I think, having in mind that the plaintiff is not to be foreclosed on the matter of proof of damages—in fact, I would be inclined to think that both sides would want to send that out to a referee or a special master because that sounds like it might be interminable—and since we are to consider only the question of liability, which, of course, involves the meaning of the contract and what, if any, reformation shall be allowed, the plaintiff should be able to indicate within the next 30 days what, if any, additional evidence it will wish to offer on the issues that are now before us. And it occurs to me that within that [340] same period briefs could be filed which will indicate the position which the parties take respecting the case on the present record.

(Testimony of R. D. Montgomery.)

Mr. Sturzenacker: I am just wondering about the briefs, your Honor. We have some additional testimony, naturally. And, if we did file briefs and outlined that testimony, we might anticipate what the witnesses might state or might not state at the time of trial. I am just wondering if the briefs couldn't best be withheld until such time as the evidence is in and then have the matter submitted on briefs.

The Court: That additional testimony would have no bearing on the issue of reformation, I take it.

Mr. Sturzenacker: Yes; any outline of evidence that we will present will be on the question of reformation of the contract.

The Court: I may be a bit confused here. I thought that you gentlemen indicated that you were prepared to try at least the issues raised by the affirmative defenses, which involve, of course, the matter of reformation. I didn't understand that you would require more time to present evidence on that issue.

Mr. Krasne: If that had been the case, we would, naturally, proceed now with Mr. Ferer and Mr. Clements and we certainly wouldn't be content to sit back and rely upon those depositions which have been filed and never intended to do so. [341]

The Court: You would want to call them?

Mr. Krasne: Oh, yes.

Mr. Sturzenacker: Those depositions were taken by the defendant, your Honor, and taken from the defendant's standpoint and not from the plaintiff's standpoint.

(Testimony of R. D. Montgomery.)

Mr. Krasne: We are prepared and can continue if the court's calendar permits and if that is the court's desire. Perhaps I misunderstood. I thought we were just to dispose of the particular affidavits and the particular witnesses in view of the turn of the trial.

The Court: In addition to the testimony of Mr. Ferer and Mr. Clements, did you have some other witnesses on the issue of reformation?

Mr. Krasne: I think there might be in the light of some of the testimony that has now developed.

The Court: Let's go forward, then, and at least complete the taking of the evidence on the issue of reformation, having in mind that you are going to be allowed 30 days to determine whether or not you want to offer evidence on the main issue as to what is the fair meaning of this contract.

Mr. Krasne: Whatever your Honor indicates he would like us to do.

The Court: We will take that up in the morning. We will take a recess until 10:00 o'clock in the morning.

(Whereupon an adjournment was taken until 10:00 o'clock a. m. Friday, September 11, 1942.) [342]

Los Angeles, California, Friday, September 11, 1942;  
10:30 A. M.

The Court: We will proceed with the case on trial, Ferer & Sons vs. Richfield Oil Corporation.

Mr. Krasne: Mr. Ferer, take the stand.

MORRIS FERER,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Q. By the Clerk: Please state your name.

A. Morris Ferer.

Direct Examination.

Q. By Mr. Krasne: Mr. Ferer, the firm of Aaron Ferer & Sons is a co-partnership, is it not?

A. Yes, sir.

Q. Comprised of whom?

A. Ester Peggy Ferer, Robert Ferer and Morris Ferer.

Q. Ester Peggy Ferer is your wife and Robert Ferer is your son, is that right? A. Yes.

Q. And who is in charge of the operation of the business? A. I am.

Q. What is the nature of the business of Aaron Ferer & Sons?

A. We are in the scrap material business and the usable [343] machinery business.

Q. How long have you been so engaged?

A. Well, our firm was associated with my father. We have been in business over 50 years.

Q. How long have you, yourself, been actively associated in the business? A. Over 25 years.

Q. What was the nature of the employment of Mr. Zeidenfeld? What was his work? What did it consist of?

(Testimony of Morris Ferer.)

A. He was a buyer of scrap material or scrap metals and scrap iron. He contacted mostly small scrap dealers and auto wreckers. He inspected and checked up on material that we would buy at some plants and saw that the material that we purchased was delivered or loaded properly or made arrangements and so forth for that, but, generally, he did buying of smaller lots of material.

Q. Was there some particular basis upon which he was authorized to buy?

A. He bought on the basis of the market price of the general market for all grades of scrap material, a fixed price that changed from time to time. There was each grading and each classification and there were prices for it and he bought on the basis of those prices.

Q. In other words, if there was an established price for sheet iron, he would have authority to go out and buy a lot of sheet iron at so much per ton so long as it was within [344] that established price, is that right?

A. That is correct.

Q. Did he have any authority to negotiate for you on any deals that involved dismantling of materials and transportation?

A. He did not.

Q. Did he have any authority to negotiate for you in connection with any lump sum deals?

A. He had no authority on any lump sum deals that would amount to any type of figure. He might take a small deal that would amount to a few hundred dollars or something like that and consult with me on it but he had no authority to go into any type of large deal, whether it was a lump sum or anything else, without first getting proper authority.

(Testimony of Morris Ferer.)

Q. In this Casmalia deal, aside from the purchase price that was payable to Richfield under the contract, did the dismantling and removal and cleaning up amount to anything very sizable in dollars and cents?

A. Yes; a very large amount of money was involved.

Q. Will you give the court some indication of how much this deal involved over and above the purchase price to Richfield.

Mr. Paradise: I object to that question on the ground that it is not clear as to whether the question is directed to the estimates that were involved during the negotiations of the contract or if the question involves the amounts that [345] were expended after the contract, unless the question is purely preliminary.

Mr. Krasne: It is preliminary. I just wanted to indicate the scope of the deal.

The Court: Will it be claimed by the defendant that this deal did not involve the expenditure of a substantial sum—

Mr. Paradise: No, indeed.

The Court: —to obtain the dismantling and removal of the salvage?

Mr. Paradise: No; it will not, your Honor.

Mr. Krasne: Very well; I will withdraw the question.

Q. Mr. Ferer, when did you first hear that there was to be some equipment sold at Casmalia?

A. When Mr. Clements came to me with the proposition or an idea that this deal was available, which I place as sometime in the latter part of November.

(Testimony of Morris Ferer.)

Q. Had you known Mr. Clements prior to that time?

A. Casually.

Q. When Mr. Clements came to you on the occasion that you refer to, did you have some conversation with him?

A. Well, naturally, we talked or discussed about what he had in mind.

Q. Was anyone else present?

A. I couldn't remember that. I don't think so.

Q. Will you please relate the conversation as nearly as you can remember it? [346]

A. Well, he came to me and said there was a big deal that Richfield had and he thought we could make a pretty nice deal; that he had had some previous dealings with Richfield and that he knew the situation pretty well; that he had just finished a deal with Richfield, and I think it was at Santa Fe Springs, although I am not sure. That was merely in the conversation. And he mentioned to me the type of deal it was and I told him that I was very much interested.

Q. What did he say with respect to the type of deal that it was?

A. Well, he told me a large refinery and a lot of equipment and so forth that Richfield had at Casmalia.

Q. Was anything discussed with respect to the basis upon which you and Mr. Clements would work?

A. Well, he mentioned that he didn't have enough funds to handle a deal of that character; that, if we got the deal, I would finance it and we would split it or he would take a portion of the profits if there were any. That is about the gist of the conversation.



(Testimony of Morris Ferer.)

Q. Did he tell you with whom he had been discussing this matter at Richfield or was there anything said about that?

A. I don't remember. I didn't go into that much detail at the time.

Q. Prior to the date of this conversation with Mr. Clements, had Mr. Zeidenfeld said anything to you about this [347] deal? A. No, sir.

Mr. Paradise: May I inquire of the court if this is subject to the rules of cross-examination, the examination of this witness under the court's order?

The Court: I take it that we have in evidence the deposition of this witness.

Mr. Paradise: Yes.

The Court: And that he is now being called by the plaintiff for such evidence as plaintiff wishes to offer. And, naturally, the witness is subject to cross-examination.

Mr. Paradise: My question was whether the examination of the witness by the plaintiff is being considered cross-examination, in the light of further examination under the deposition, or whether he is being called as an original witness.

Mr. Krasne: Principally, I am probably using the witness more in rebuttal as a result of certain evidence that was introduced as a result of previous witnesses. I will state to the court I am going to try not to cover subject matters that were adequately dealt with in the deposition, although occasionally I may not be able to help it.

(Testimony of Morris Ferer.)

The Court: Whether this evidence be referred to as evidence in chief or evidence by way of rebuttal, the witness is subject to cross-examination by you.

Mr. Paradise: Yes. But that wasn't what I had in mind, [348] if the court please. I was merely going to object, if this examination of the witness were cross-examination of the matters that I covered in my examination at the time of the deposition, to certain things which would be improper cross-examination on the ground that they were not gone into in the deposition. But, if it is my understanding that this is an examination in chief and that cross-examination may be made by me, I will eliminate all objections of that sort.

The Court: I think that is a fair way of stating what the situation is.

Mr. Krasne: Yes; that is quite satisfactory.

The Court: Yes.

Q. By Mr. Krasne: Do you recall Mr. Zeidenfeld ever having spoken to you about this particular deal prior to the time that you made a deal with Richfield?

A. I do not recall him ever speaking to me about this particular deal. There may have been a time that he mentioned Richfield to me because we were doing business with Richfield. We had purchased material from Richfield prior to this deal but at no time do I remember Mr. Zeidenfeld ever speaking to me about this particular deal.

Q. And, if he did say anything to you about the deal, do I understand that you did not understand that he was talking about this particular deal?

A. Yes, sir.

(Testimony of Morris Ferer.)

Mr. Paradise: I object to that on the ground it is [349] leading and suggestive.

The Court: I will let it stand.

A. That is correct.

Q. By Mr. Krasne: If you had known that Mr. Zeidenfeld was talking to Richfield about this deal and that he was bringing it to your attention, would you have made a deal with Mr. Clements to give him part of the profits for bringing you the deal?

Mr. Paradise: I object to that on the ground it is speculative, if the court please, and hypothetical.

The Court: I think it is a matter of argument. The witness has testified, in effect, that the first he heard about the so-called Casmalia deal was when Clements brought the proposition to him and suggested that since he, Clements, couldn't finance it, he wanted the plaintiff to go in the deal with him provided the plaintiff would finance it. From that I think it is a fair inference that that circumstance was the reason why the witness went into the deal and that as far as Zeidenfeld was concerned the witness never heard of the Casmalia deal.

Mr. Krasne: With that statement, I will withdraw the question.

Q. Prior to the time that you made the deal with Richfield, had anyone working for Richfield ever said anything to you about their estimate of quantity of material on the job? [350] A. They did not.

(Testimony of Morris Ferer.)

The Court: May I interrupt to inquire is there any contention that anyone connected with Richfield referred to the quantity that was involved other than what took place in the conversation between McGahan and Zeidenfeld?

Mr. Paradise: No, if the court please, other than the testimony in the affidavit of Mr. McGahan that in his conversation with Mr. Ferer he told him at that time that he, Mr. McGahan, at that time, which I believe was sometime in September or the early part of November, did not have information at that time as to the quantity but that he would have information as to the quantity later and would be willing to furnish it, and that Mr. Ferer never made any further inquiry for that information.

The Court: Then, I think it is clear that the defendant has offered no evidence to the effect that any figures were actually communicated to the plaintiff respecting quantities except such information as is claimed to have passed from McGahan to Zeidenfeld.

Q. By Mr. Krasne: Mr. Ferer, prior to the time that you made your offer to Richfield to purchase the Casmalia equipment, had you heard from Mr. Zeidenfeld or anyone at all that Richfield estimated that their quantity of equipment on this job was 1,500 tons?

A. I did not.

The Court: May I have that question read? [351]

(Question read by reporter.)

Q. By Mr. Krasne: If, prior to the time that you made your offer—I will withdraw that. What quantity of material did you think there was in the job before you made your offer?

(Testimony of Morris Ferer.)

A. I estimated there were approximately 3,000 to 6,000 tons.

Q. If you had estimated that there would be only 1,500 tons of material, would you have made the same offer? A. I would not.

The Court: Mr. Reporter, will you read the answer to the preceding question?

(Answer read by reporter.)

Mr. Krasne: Will you read the witness the last question?

(Record read by reporter.)

Q. How much would you have offered if you had thought the quantity would amount to only 1,500 tons?

Mr. Paradise: I object to that question, if the court please, as wholly immaterial.

The Court: May I suggest that, the witness having told us that he estimated that there was a minimum of 3,000 tons on which his offer was based, I think it is a fair argument to say that, had he estimated the quantity as 1,500 tons, his offer might have been just about half what he submitted. I don't know what more he could tell us.

Q. By Mr. Krasne: Did you ever see any of the pipe [352] equipment as it was being removed by you from the Casmalia job? A. I did.

Q. Please tell the court what the condition of that equipment and material was when it was removed.

A. Well, generally, the largest proportion of the pipe was in good condition. Other equipment, or some of it, was scrap and some of it we cut apart and tore apart and

(Testimony of Morris Ferer.)

saved part of it as usable material and part of it was scrapped. The tanks, or a great proportion of the tanks, were good tanks and were sold as tanks, usable tanks.

Q. What disposition did you make of the pipe that you took up from this job?

A. Well, the largest proportion that was good pipe we sold to various pipe people that use it and resell it for pipe mostly in the oil business.

Q. In your opinion, was the pipe good enough to be used for that purpose?      A. It was.

Mr. Paradise: For what purpose?

Mr. Krasne: To be used for resale to people in the oil business.

Q. As pipe?      A. As pipe; yes, sir.

Q. To whom did you sell some of the tanks that you referred to? [353]

A. We sold quite a large number of the tanks to the State of California.

Q. As tanks or as scrap?

A. As tanks, which they are going to use for storage purposes.

Q. Was very much of the pipe corroded or ruined and useless as pipe?

A. A very small percentage and that was mostly, if I may state, pipe that was exposed to the outside, because it seems the air, the salt air, that being close to the ocean, or at least that is the explanation that I got, corroded the pipe; but the pipe that was underground was practically all in excellent condition.

(Testimony of Morris Ferer.)

Q. I believe you testified in your deposition that the largest proportion of the pipe was actually underground. Is that correct? A. That is correct.

Q. Did you hear Mr. Montgomery's testimony with respect to the material and equipment at Casmalia?

A. I did.

Q. If the material and equipment had been in the condition as described by him, what market would there have been for the salvage?

A. That would have been considered scrap and it would have had a market for remelting purposes as scrap iron.

Q. As scrap iron? [354] A. Yes, sir.

Q. Are you familiar with the established market price for scrap iron in January, 1941? A. I am.

Q. What was the established market price for scrap iron in January, 1941?

A. Approximately \$12 a ton f.o.b.

Q. What would be the fair and reasonable cost to take that material up at Casmalia per ton?

Mr. Paradise: If the court please, I object to this because it seems to me it tends to the same element of damages which the court has referred to a future time. If we are going into this element of the problem, I will object on the ground of lack of foundation.

Mr. Krasne: I think I should explain, if I may, why I offer this evidence. I think it is separate and apart from the other theories which we have discussed. Richfield, the defendant in this case, at least with respect to the cross-complaint, is seeking equitable relief and it is

(Testimony of Morris Ferer.)

charging that the plaintiff had certain knowledge or suspicion of what was in its mind. I want to establish by this witness, who is qualified and competent as to values of scrap and cost of transportation and cost of taking up the material, that, if the equipment and the material on the Casmalia property was as it has been described by the defendant, and if the quantity of material was as estimated by the defendant, when [355] they received an offer from the plaintiff that was so entirely out of proportion to what they understood the equipment to be, the burden should have been upon them to have inquired if the plaintiff wasn't making a mistake rather than the other way. And it is for that purpose that I offer this evidence.

The Court: The witness has already told us that most of the tanks and most of the pipe were of a character that the same could be used again, the tanks for storage purposes and the pipe for further use in the oil business. Regardless of what the defendant thought was the condition of the scrap or the pipe or whatever the salvage was, I don't think that they can escape being chargeable with knowing as much about the condition of their material at least as could have been ascertained by reasonable inspection. We are not here dealing with what it would have cost to dismantle and remove a lot of scrap. We are concerned at best with what the material was that was involved here. If we are going to go into the subject matter of what it would have cost to have dismantled and removed all of this material, on the assumption that it had been for the most part useless for further purposes and was good only primarily for scrap, I think we will open up a realm of speculation that will really



(Testimony of Morris Ferer.)

lead us nowhere. I think we would at least have to inquire not only along such speculative lines if we got started on this but whether or not the deal actually made, assuming that it [356] was of the character which the witness has described, involved such as the cost of dismantling and removal and resale, and we will be asking then the question of whether or not the deal as it now stands was a profitable deal. Do you think that we may inquire as to whether the deal as it has presently been consummated is or was a profitable deal?

Mr. Krasne: Peculiarly, since the case apparently turns so much upon what was in one's mind, even that question might have a materiality. In other words, if a person makes an estimate and he is established in business and presumably knows his business and he makes an offer, taking into account equipment which he believes is included in the deal, and it could be shown that, if that were the case, his offer would have been an intelligent one, a businesslike one, and he would have earned a profit from it, whereas, if the deal is to be interpreted as the other side contends it should be, it might have a bearing to actually show that, in truth, under their contention a man, who presumably should have some business judgment and sense, was making a losing deal, because, as a matter of fact, that is what the evidence will show; and I think it would be of assistance in interpreting what the parties had in mind at the time they made the offer. I realize it is speculative but intentions are speculative. The whole realm of mental workings of all the people connected with the deal in many respects is speculative but, when you come down now to the application of a business [357] principle and a business problem, I think it might have a bearing.

(Testimony of Morris Ferer.)

The Court: Is it your position and do I understand that you are prepared to prove that the transaction in its present condition was of a character that men in the line of business such as this plaintiff, and having in mind the market conditions prevailing in January, 1941, would not normally be expected to have offered such a price as this plaintiff offered for the material that has actually been delivered to it or which it has been permitted to take?

Mr. Krasne: I will state, further and more specifically, that we offer to prove and will prove that, without the pipe in the wells, the quantity removed actually was only some 1100 tons, and that actually as the deal stands at the present writing, without taking into account the pipe in the wells, the deal stands the plaintiff a loss of several thousand dollars without his having charged himself with any overhead. And to me I think it is a very practical point. A man is either a fool or he must have had in mind the pipe that is in controversy. He just doesn't go into a deal to pay \$22,000 plus all of the collateral costs to come out losing money. And I think we can establish his experience is such that he couldn't have been that foolish.

The Court: What do you say, Mr. Paradise, to the proposition that, in order to show the intention of the plaintiff and what may reasonably be inferred as being the [358] plaintiff's understanding of what the defendant intended, it becomes pertinent to inquire what was the fair market value of the material which the defendant has permitted the plaintiff to remove?

Mr. Paradise: I think the answer to the court's question requires a consideration of several matters. In the first place, the particular question to which the objection

(Testimony of Morris Ferer.)

was raised was the question of both the value and the cost of the removal of the scrap material; and I believe Mr. Krasne arrived at that point by asking the witness if he had heard Mr. Montgomery's testimony and that the assumption was then made that it was Mr. Montgomery's testimony that the equipment was scrap. I want to point out to the court that I believe that is a misinterpretation of Mr. Montgomery's testimony. The testimony of Mr. Montgomery was that it wasn't usable to Richfield Oil Corporation in connection with its producing operations and that some of it he felt was in bad condition. If we eliminate the problem as to whether this was or was not scrap, then I think it is probably material, as the court suggests, that an inquiry be made as to estimates and costs, that is to say, their estimates of costs, which were made prior to the time at which the deal was consummated. If the court will recall the depositions of both Mr. Ferer and Mr. Clements, if we go into the proposition of estimates, I tried to inquire into that very fully at the time of the depositions and received [359] the answers on numerous occasions that they had no recollection whatsoever of their estimates. I merely point out that, if this is a proper subject of inquiry, it is already in evidence before the court of the fact that there were no estimates either of costs or recovery which either witness at the time of the depositions could recollect.

Mr. Krasne: That is not entirely so. It is true that both Mr. Ferer and Mr. Clements testified they had no deal for a breakdown. It was just a deal that you couldn't estimate with precision because so much of the material was underground, but, as to the quantity, the record shows that they both estimated that there were from 3,-

(Testimony of Morris Ferer.)

000 to 6,000 tons. I want to show that, if the deal is as contended for by the defendant, the quantity removed was 1100 tons. It, therefore, must have had in mind something beyond that.

The Court: The ruling is this, that the plaintiff will be permitted to show the fair market value of the material which they succeeded in obtaining from this transaction but not what it would have been had the material been something else.

Mr. Paradise: In the inquiry as to what was the fair market value, if the court please, is that inquiry as to the value of the equipment in place, installed and before dismantling, or does that mean the fair market value after all of the work of dismantling has been performed? I raise that point only for the reason that, if we are going into the [360] second problem, it is a question of costs of labor and costs of transportation and things of that sort.

The Court: Of course, we want to keep out of this particular trial those items which would necessarily go into the trial of an issue of damages.

Mr. Krasne: Oh, yes.

The Court: And I think we must treat this pending matter in the light of what men in the same type of business as the plaintiff would have fairly estimated was the value of this material about to be sold where it was, as, obviously, any prospective bidder would have to make an estimate and could not be expected to determine with arithmetical exactness those figures which later experience brought to light.

(Testimony of Morris Ferer.)

Q. By Mr. Krasne: Your testimony is that your over-all estimate was from 3,000 to 6,000 tons of material in this Casmalia deal, is that correct?

A. That is correct.

Q. Do you recall, roughly, what proportion of that total estimate you thought would be pipe in the oil wells as distinguished from the other pipe and other equipment on the property?

A. Well, we estimated that there would be 50,000 to 100,000 feet of pipe in the wells and 50,000 to 100,000 feet of pipe of that character would weigh approximately 2,000 tons.

Q. Has the work of removing the pipe and material and [361] equipment been pretty generally completed save for the pipe in controversy? A. Yes, sir.

Q. What quantity has been removed?

A. May I have that question again?

(Question read by reporter.)

A. From this Casmalia deal?

Q. Yes; from this Casmalia deal.

A. Approximately 1100 tons total in all.

The Court: I am not sure that I understand the answer. The 1100 tons refers to what? To pipe?

A. Of everything; the 1100 tons consisting of pipe and other miscellaneous items, boilers, rods and various materials that were on the property.

Q. By Mr. Krasne: Then, if I understand you correctly, you have now taken up all of the material that was included in this sale except for the pipe or casing in the wells which is in controversy, is that right?

(Testimony of Morris Ferer.)

A. That is correct with the exception of a few tanks, small tanks that have to be removed and there is some debris and brick and so forth that has to be taken care of, but substantially everything has been taken off of the property.

Q. Taking into account the moneys which you have paid to Richfield and expenses that have been incurred in the taking up of the equipment and transporting it, do you now show a profit or a loss on the materials thus far removed? [362]

Mr. Paradise: I object to that question, if the court please, on the ground that there is no proper foundation laid.

The Court: When you speak of lack of foundation, to what are you referring?

Mr. Paradise: The fact that there is no showing as to how a loss, if any, occurred, what the costs were or what their original estimates of costs were or whether their actual costs were in excess of their estimates of cost. I think, before an inquiry as to the final result as to whether a loss has been sustained is made, we must find out what they contemplated at the time they went into the matter as to the costs.

Mr. Krasne: I think that is a matter for cross-examination.

The Court: Wouldn't it seem essential, in order to render this evidence pertinent, that we have the type of data to which the objection directs our attention? In other words, it is conceivable that a man may lose money on a deal but that of itself would have no evidentiary value in a case of this kind.

(Testimony of Morris Ferer.)

Q. By Mr. Krasne: Mr. Ferer, do you know the gross amount that has been realized—I will withdraw that. Has this 1100 tons of material that has been removed been sold by you? A. Yes, sir.

Q. Do you know of your own knowledge how much you have [363] realized from the sale of that material?

A. Well, I don't know offhand. I would have to refer to my books. I don't quite understand if you have reference to whether I knew the gross amount of what we received for the 1100 tons or not.

Q. That is right.

A. Well, if I made a statement to that effect, it would be a guess and I would have to refer to my books.

Q. And you do have books and records that you can refer to to get that information? A. Yes, sir.

Mr. Krasne: I will abandon that inquiry for the moment, if the court please, and come back to it after the noon recess, if I may.

Q. Did Mr. McGahan ever tell you that the defendant Richfield desired to sell only service equipment?

A. He did not.

Q. Did anyone connected with Richfield ever make that statement to you? A. They did not.

The Court: May I interrupt to inquire is it claimed by defendant that anybody other than McGahan made such a statement?

Mr. Paradise: I don't recall, if the court please. I can review the affidavits, though, and find out.

(Testimony of Morris Ferer.)

The Court: I will let him answer the question. Will you [364] read the question?

(Record read by reporter.)

Q. By Mr. Krasne: Mr. Ferer, do you remember the occasion of a meeting between yourself, Mr. Davis, Mr. Clements, Mr. McGahan and Mr. Paradise, in Mr. Paradise's office?      A. I do.

Q. That meeting was when?

A. It was a few days—I don't fix the exact date but a few days after I was at Richfield's office and gave them a check for \$22,000 in payment of this deal.

Q. What conversation, if any, did you have with Mr. Davis before you went into this meeting at Mr. Paradise's office?

A. Well, we had very little conversation; merely that we made a deal, and I brought him the check. He then handed me a piece of paper outlining the nucleus of the deal and he contacted Mr. Paradise, who apparently was busy and couldn't see us at that time and told us to come back, and that we were to go up and draw up the final or formal contract, or whatever you want to call it.

Q. Did you understand, after you had made your offer in writing and had received Richfield's offer in writing and after you had paid Richfield the \$22,000, that there were to be further negotiations in connection with the deal?

A. I did not. I took it for granted that we had [365] already made a deal.



(Testimony of Morris Ferer.)

Mr. Krasne: I should like to state to the court that at one stage during the proceedings, at a time when I think I was talking about something else and my mind was probably not as clear as it should have been, your Honor directed a question to me and asked me if the depositions showed that, after the money had been paid, it was contemplated that there were to be any further negotiations with respect to the contract, the January 17th contract. And I believe I indicated to the court that my recollection was such, that is, that there were to be some further discussions and negotiations leading up to the January 17th contract. In going over the depositions and in interrogating Mr. Ferer, I find that actually I am in error in my conclusion or interpretation to this court and I trust that it won't be prejudicial to our case, that is, to the plaintiff. I think that it is Mr. Ferer's belief and feeling that actually the January 17th contract was to have been merely a formal crystallization of what was pretty well and completely set forth in the offer and acceptance, and, had that not been the case, he would not have parted with his \$22,000, and that he didn't propose to pay the \$22,000 and then start to negotiate a deal. So, if there is any uncertainty in the record, I trust the court will accept my statement to clarify it.

Q. I show you now what purports to be a letter, on the letterhead of Aaron Ferer & Sons, dated December 10, 1940, [366] which has been introduced as Plaintiff's Exhibit No. 2. When I referred to an offer having been made a moment ago, I referred to that document. That was the offer, was it not, that you had submitted to Richfield?

A. That is correct.

(Testimony of Morris Ferer.)

Q. I show you also Plaintiff's Exhibit No. 3, which purports to be a communication on the letterhead of the Richfield Oil Corporation. And, when I referred to Richfield's acceptance a moment ago, I had this document in mind. Was that the acceptance that you had received from Richfield?      A. That is correct.

Q. And what has been introduced and marked as Plaintiff's Exhibit No. 1, which I show you, was the memorandum of reply which Mr. Davis gave you when you handed him the \$22,000 on January 8th, is that correct?      A. That is correct.

The Court: I don't know why we are going all over this again.

Mr. Krasne: I will say I am leading up to only one point, on which there may be some uncertainty.

The Court: Very well. Then, let's go ahead. But it seemed to me all of this had been admitted by the other side and I didn't know why you were going over it again.

Mr. Krasne: Well, I think even the other point that I had in mind bringing out is pretty well covered, too, and I will cease. If the court please, I would like the privilege [367] of recalling Mr. Ferer after the noon recess with respect to the matters contained in his books. Except for that, I am through with Mr. Ferer.

The Court: We will take that up, then, when it is offered. Do I understand the cross-examination may now proceed?

Mr. Krasne: Yes, your Honor.

The Court: May I suggest, in view of the time that has already been occupied, that we try to conclude with this witness before we adjourn for the noon recess?

(Testimony of Morris Ferer.)

Mr. Paradise: I was going to limit the cross-examination very considerably, if the court please, in view of all the testimony that is already in the deposition.

The Court: Then I believe that you are also calling Mr. Clements?

Mr. Krasne: Yes, your Honor; and that will be very brief.

The Court: It will be brief?

Mr. Krasne: Yes, your Honor.

Cross-Examination.

Q. By Mr. Paradise: Did I understand you to say that you have never discussed with Mr. Zeidenfeld any part of this transaction, Mr. Ferer?

A. Not prior to the making of the deal.

Q. That was what I meant, prior to the date of the contract. Do you recall Mr. Zeidenfeld telling you that he had understood or that he had learned from Mr. McGahan that [368] Richfield's estimate of the quantity of the salvage was 1,500 tons? A. I do not.

Q. Did Mr. Zeidenfeld ever tell you that it would take about \$20,000, in the neighborhood of \$20,000, to make an acceptable bid? A. He did not.

Q. Did he ever mention a sum in connection with this? A. No, sir.

Q. Would you say that you had never discussed the matter with Mr. Zeidenfeld?

A. I don't remember ever discussing this transaction with Mr. Zeidenfeld. As I say, I have discussed Richfield matters with Mr. Zeidenfeld.

(Testimony of Morris Ferer.)

Q. Did Mr. Zeidenfeld make any written reports to you?      A. No, sir.

Q. Were all of his reports oral?

A. All of his reports were very oral.

Q. Are you acquainted or familiar with the operations of an oil field?      A. I am not.

Q. Are you acquainted with the equipment that is used in an oil field for operating purposes?

A. I am not.

Q. Do you have any knowledge of that whatsoever?

A. No, sir. [369]

Q. Then, you have no knowledge as to whether or not the equipment, the pipelines and the tanks that were taken up, were in any condition for use by Richfield Oil Corporation in the operation of that field, is that correct?

A. I don't quite understand your question, Mr. Paradise. May I have it again?

(Question read by reporter.)

A. I wouldn't know anything about Richfield; no, sir.

Q. Well, would you know about any other oil company?

A. I would say that, if you are referring to the pipe, I have experience as far as pipe is concerned and that any other oil company could easily use that pipe.

Q. For what function or purpose?

A. The function that pipe would be used for.

Q. As a pipeline, do you mean, or as a culvert?

(Testimony of Morris Ferer.)

A. I am not referring to culverts. They are an entirely different matter. I am referring to use as a pipe for the original intention it was manufactured for.

Q. Are you talking about the condition of the pipe as it was in the ground, with steam lines in it and all and other debris in the pipe, which had been there for 15 years, or are you talking about the pipe after it had been taken out, cleaned, burned and reconditioned?

A. I am talking about the pipe after it had been taken out, which was in good condition to be re-used as it was taken out of the ground. [370]

Q. Do you mean after it was taken out and cleaned and put back into condition?

A. No. Naturally, pipe with oil in it couldn't be used for drinking water but the pipe was in no way affected by the oil that was in it when it was taken out of the ground or the fact that there were lines inside of the larged sized pipe. In fact, it seems that the oil preserved the pipe because a great deal of it was just as good, in my opinion, as the day it came from the factory.

Q. That is, in your opinion as a salvage dealer rather than in your opinion as an oil operator, is that correct?

A. I am not qualified as an oil operator.

Q. I believe you testified, Mr. Ferer, that the tonnage that you estimated of the casing that was contained in the wells was 2,000 tons. Is it not correct that you formerly testified that the estimate of tonnage was somewhere in the neighborhood of between 1,000 and 1,500 tons?

(Testimony of Morris Ferer.)

Mr. Krasne: Show it to him in the deposition if that is what you are talking about.

A. I estimated in the deposition that there would be 50,000 to 100,000 feet and of that type of casing 50,000 to 100,000 feet would be a minimum of approximately 2,000 tons.

The Court: Let's see if I understand your answer, that, if the casing totalled some 50,000 feet, that casing would weigh approximately 2,000 tons? Is that what you mean?

A. Yes; approximately 8 pounds to the foot, your Honor. [371]

Q. By Mr. Paradise: Is that the 50,000 feet, Mr. Ferer?

A. I am referring to the minimum amount; yes, sir.

Q. The 50,000 feet would be what quantity?

A. Approximately 2,000 tons.

Q. And you formerly mentioned between 50,000 and 100,000 feet?

A. Yes, because, as they explained to me, there was probably 100,000 feet of casing in those wells but whether all of it would be recoverable is the question. In other words, in taking it out, and I am not speaking now as an expert but only as to what I have been told, you can't recover 100% of the casing that is in the well.

Q. And the 100,000 feet would amount to what in tonnage? Would that be 4,000 tons?

A. Approximately 4,000 tons.

(Testimony of Morris Ferer.)

Mr. Paradise: I am sorry to take the court's time but Mr. Krasne asked me to produce something out of the deposition.

Mr. Krasne: It is not necessary now because the witness has answered the question.

Mr. Paradise: Well, I can't find it now anyway.

The Court: May I interrupt to ask the witness to see if I understand an answer that he gave a moment or two ago? I believe you used some such expression as this, "From what they told me, I estimated that there would be 50,000 to 100,000 feet of pipe in the wells." When you used the word "they", were you referring to anyone connected with Richfield? [372]

A. No, sir. I was referring to Mr. Clements when we went up there to look over the property before we made our offer.

Q. By Mr. Paradise: Mr. Ferer, is it not correct that your costs of doing this work were far in excess of what you had originally anticipated?

A. Well, again, I would have to refer to our books. I think our costs ran a little bit higher.

Q. I am talking now about the matter of the removal of the boilers and pipelines and tanks and the refinery buildings.

A. I understand what you are referring to.

Q. Did the condition of the weather have anything to do with that increase in cost?

(Testimony of Morris Ferer.)

A. Well, we ran into considerable rainy weather and the structure of the ground there was so that it made it very hard to accomplish much during this rainy weather and we had to maintain a certain crew and that probably ran our costs a little higher.

Q. Did the condition of the weather and the fact that it was the rainy season have anything to do with the cost of hauling out the salvage equipment which you were purchasing?

A. Most of the salvage equipment was shipped by railroad and we didn't have such a great deal to do with it.

Q. How did you get it out to the railroad?

A. We hauled it by truck to the railroad which was [373] probably half a mile from the place.

Q. Did the rainy condition and the wet condition of the ground have anything to do with the difficulties in hauling?

A. Only on the lease. The roadway to the lease was, of course, a hard surfaced road.

Q. What would you say was the amount of increase in cost because of that condition?

A. I just told you that it would be purely a guess but I can ascertain that when I consult my books.

Q. Do you recall a conversation with Mr. H. H. Kelly in his office in the Richfield Building, I think it was in June of 1941, when you were asserting the right to abandon these wells and take the casing from them?



(Testimony of Morris Ferer.)

A. Well, I remember a visit to Mr. Kelly's office. I don't know what conversation you are referring to.

Q. Do you recall whether or not you stated at that time that, because of the wet condition of the weather that occurred after you entered into this contract and after you had your crew of men up there, it became almost impossible for you to operate and that your men were idle for a great period of time and that that greatly increased your costs and that that had resulted in not only a loss of profits but also a cash out-of-pocket loss on the transaction?

A. I don't remember the conversation you are repeating for me. I remember stating we had a very substantial loss on this deal and we discussed the wells at the time, and I [374] told them at that conversation or at that meeting that we definitely anticipated getting the pipe out of those wells and that we would have a terrific loss if we didn't get what we expected to buy. Whether I told him the very words that you are talking about, I can't repeat. We did encounter additional expense due to rainy weather and I mentioned that, but whether it was that conversation I can't tell you. I made no secret about it. I mentioned it and gladly admit it. I can't give you any figures exactly of how much our cost was on account of the rainy weather. We keep no set of books of that kind.

Q. But that greatly contributed to the amount of the loss, did it not?

A. Well, I think most of it was the fact that we didn't get everything we expected to buy that contributed to it.

(Testimony of Morris Ferer.)

Q. I think you are arguing with me rather than answering the questions.

A. I am sorry. I don't mean to argue. I apologize.

Q. To what extent did the unforeseen weather conditions contribute to the amount of your loss? Can you answer that? I mean can you give any percentage of the over-all costs that was caused by that?

A. No; I have never tried to break it down or given it that kind of thought. I know that the deal, after we found out that we were in this type of difficulty, looked very sour and that is about all. We didn't anticipate the [375] type of weather we ran into. There is no question about that.

Q. You referred in answer to Mr. Krasne's questions to the date on which you gave a check to Richfield Oil Corporation in the amount of \$22,000, and I believe you stated that was on January 8th, is that correct?

A. Well, it was, I think, January 8th; yes.

Q. And that was also the date on which Mr. Davis gave you that memorandum?      A. That is correct.

Q. And I believe you also stated—or I will withdraw that. Did you testify that that was the deal as of that date?

A. Well, I testified that, when I received your letter of January 2nd accepting our offer that that was a deal, that is all there was to it and I went up to Casmalia and made a trip and made plans and everything else. And then, on January 8th, I went to the bank and had a check certified for \$22,000 and took it up there and paid

(Testimony of Morris Ferer.)

the money, and everything was in complete detail as to the basis of the deal. I certainly did figure that I had a deal and that there wasn't anything else involved excepting routine detail.

Q. Subsequent to that date, you said that there was a meeting in my office, did you?

A. Subsequent to what date?

Q. To the date on which you delivered the check for [376] \$22,000.

A. No, sir; it was subsequent to the date of this formal contract, as you call it. There was no meeting in your office until a few days after I had given the check to Mr. Davis.

Q. That is what I meant. The meeting in my office occurred after the check had been given, is that right?

A. Yes; within a day or two or a short period. I don't remember the exact date.

Q. Was there not considerable negotiation and discussion of various items of the contract at that meeting which occurred, as you say, a few days subsequent to the giving of the check?

A. Well, no. There were discussions but the discussions were mainly as to when we were going to get started. There was one discussion there on the material which you had sold previous to our contract. I think that was the longest point of discussion there, was the fact that we didn't know where to cut off the pipe on this various equipment, stills and so forth, that you had sold, and it was very ambiguous as to the way that was stated. And

(Testimony of Morris Ferer.)

the fact was that we wanted to settle that question of whether they were going to cut the pipe off that connected these stills a mile from there or right up to the point of the stills and that was settled. I think Mr. Davis called someone. I don't remember the details. But that was one of the things we negotiated [377] about and we settled at that time that we were to cut them right off flush with the piece of equipment you had sold because the way you had it there at that time these people might have claimed a mile of pipe or the full length of the pipe, and we had to settle that at that time.

Q. Had any contract been drawn at that time?

A. Well, I don't know what you mean by a contract. No contract such as this final contract had been drawn.

Q. Is it not true that at that meeting the only documents that were before those who were discussing the transaction were this memorandum of January 8th, which is Plaintiff's Exhibit No. 1, and Aaron Ferer's offer of December 10th, which is Plaintiff's Exhibit No. 2, and Richfield's letter of January 2nd, which is Plaintiff's Exhibit No. 3; that those were the only documents that were present as a part of the discussion and that no contract had yet been drawn?

A. These were the only documents we had but I don't even know that those were before us at the time. I don't even remember at this discussion that there were any documents. They may have been there. I can't say definitely yes or no.

(Testimony of Morris Ferer.)

Q. Do you recall that any contract had been prepared, even a preliminary contract, along the lines of the final contract that was dated January 17th?

A. I don't remember whether a preliminary contract had [378] been made or had not been made. There was a discussion and then the final contract that you are talking about was made. There may have been a preliminary contract because I mentioned to you, if you include all metal and all lumber, that will cover everything. We bought everything and I don't remember whether that was a contract that I had changed at that time or whether it was in the discussion and you had that in this final contract.

Q. It was on that occasion of that conversation, which was after the check had been given, that you asked for the inclusion of the words "metal and lumber," is that correct?

A. That is correct.

Q. Was it also on the occasion of that conversation that there was discussed the exclusion of the gas line or lines running from the superintendent's house to one or more of the wells?

A. Well, I think there was some discussion. As I stated before, I paid no attention to it because a gas line for a superintendent's house didn't mean very much to me as far as value was concerned, with hundreds of thousands of feet of pipe up there. A gas line to a superintendent's house just didn't mean anything and I didn't give it any thought. I think there was some discussion, though.

(Testimony of Morris Ferer.)

Q. That hadn't been discussed in any prior meetings between you and Mr. Davis or Mr. McGahan, had it?

A. No; nothing like that was discussed. [379]

Q. Had there been any discussion prior to that date of the matter of your insurance coverage as a contractor in performing this work?

A. I think I brought that up myself or we discussed that. That is a very common thing in a deal of this kind, that we show the company we do business with that we have proper insurance and that they would be absolved from any liability that might occur on account of our being at fault. So I think that the insurance was discussed. I don't remember whether it was discussed before or at that time but we did say we would send certificates from our insurance company to you, which we did. I don't remember whether we had those or not there. I think I made arrangements the minute I got your letter of January 2nd with our insurance company to start making the proper and necessary arrangements for the men that were away on this job but I don't remember whether it was right after January 2nd or after we paid you the money. But I do know, immediately the minute we got your acceptance, we had a deal.

Q. There was nothing in the letter of January 2nd that mentioned anything about insurance, was there?

A. No.

Q. Had that been discussed prior to the meeting in my office?

A. No. But it is a natural thing. We wouldn't lay ourselves open to any damages on the part of our own people [380] suing us for work that has to be done.

(Testimony of Morris Ferer.)

Q. My question is had anyone employed by Richfield Oil Corporation informed you prior to that date what Richfield's requirements were as to what insurance you would be required to carry as a contractor as part of this transaction.

A. Before what date, Mr. Paradise?

Q. Before the date of the conversation in my office to which we have been referring.

A. I can't answer that. I can't honestly say whether it was before when we were at Mr. Davis' office or not but the proper insurance was taken care of. There was no fixed time that I can remember.

Q. Do you recall whether there was any discussion prior to the discussion in my office of the matter of mechanics' liens resulting from your work or the protection by Aaron Ferer & Sons of the property against mechanics' liens?

A. I don't know what you mean, Mr. Paradise.

Q. I will make it clear. The contract contains a provision concerning the protection by you of the property against mechanics' liens. When was that matter discussed between you and any Richfield representative?

A. I don't think it was ever discussed. I think it was just put in the contract and I took it for granted as a natural form of your method of doing business.

Q. Do you have any recollection of whether that matter [381] was or was not expressly discussed?

A. I would say that it was not discussed because I have never had occasion for anything like that.

(Testimony of Morris Ferer.)

Q. Do you recall any discussion between yourself or Mr. Clements in your presence and any employees or representatives of Richfield concerning compliance with the regulations of the fire warden or the Fish and Game Commission in performing your work under this contract?

A. May I have that question again, please?

(Question read by reporter.)

A. There was some discussion. I don't remember where or when or how. But, naturally, taking it for granted that we would comply with all of the requirements of the law, it just passed on in a normal manner. I don't remember that there was any discussion or that there would necessarily be any discussion.

Q. You have no recollection of that now, is that correct?

A. I have no recollection of any extraordinary discussion. It might have been mentioned or said that, "You are to comply with the laws", and, naturally, we took that for granted.

Q. Wasn't it true, Mr. Ferer, that the memorandum that Mr. Davis gave you on January 8th was merely a nucleus or the basis on which the contract would be drawn and was merely a preliminary memorandum for the purpose of discussion? [382]

A. No; it was a memorandum, in my opinion, and what I thought when I handed him my money was that it was the basis or the fundamentals of this deal and that the other things were just formal things, such as insurance and such as the laws you were talking about and various other things that are just natural. You are not



(Testimony of Morris Ferer.)

going to let us go off completely wild, naturally, nor would we let you; but these were the basis and the salient points in the entire deal.

Q. But there were matters for future negotiation, were there not, subsequent to that date?

A. When you say matters of negotiation, I can only answer you nothing of importance with reference to this deal. If you are talking about a pipeline, a small pipeline. Mr. Paradise, the value of that pipeline would not be \$5 from my standpoint. So I certainly wouldn't give it any outstanding thought.

Mr. Paradise: I move that the last two sentences of the witness be stricken as a voluntary statement and not responsive to the question.

The Court: Let it go out.

Q. By Mr. Paradise: Mr. Ferer, do you recall that your deposition was taken in this case on February 6 and 7? A. Yes, sir.

Q. I would like to read to you two or three questions that were asked of you on that date and also your answers.

The Court: Let the witness have the original, Mr. Clerk. [383]

Q. By Mr. Paradise: Referring to page 246, starting in line 3, the question is, "In your conversation with Mr. Davis, that I think you said occurred on January 8th, did Mr. Davis tell you that it would be necessary to make a written contract on this transaction?"

(Testimony of Morris Ferer.)

“A.—That seemed to be his procedure. He didn’t say it was necessary. He just merely took it for granted that you were going to write up a contract.”

Then, referring again to page 246, line 24, “Q—I hand you Plaintiff’s Exhibit 1, which I understood you to say was given to you by Mr. Davis on January 8th, is that correct? “A.—Yes, sir.

“Q.—Did that memorandum purport to set forth all of the terms of your contract with Richfield Oil Corporation?

“A.—No. That merely was the nucleus or the basis that the contract would be drawn on.

“Q.—It was merely a preliminary memorandum for the purpose of discussion, was it not?

“A.—I imagine so.

“Q.—When the contract was finally prepared and signed, were there additional exclusions from the exclusions stated on that memorandum?

“A.—Yes; there were some additional exclusions made that came up in the discussion.”

Mr. Ferer, do you recall on the occasion of your deposition that those questions were asked of you and that those [384] were the answers which you gave?

A. Yes, sir; those are correct.

The Court: Where did you quit reading?

Mr. Paradise: I believe it was page 247, line 13. I believe that is all, if the court please.

(Testimony of Morris Ferer.)

Redirect Examination.

Q. By Mr. Krasne: There were a number of things that Richfield asked you for, after you thought the deal had been set, that you let them have, isn't that so?

A. Yes, sir.

Q. What was there that arose besides this gas line that you have referred to?

A. Well, there was a power line that they included and then later on found out that it didn't belong to them and they asked us to omit the power line; that it wasn't originally intended in the contract; and we agreed not to take the power line.

Mr. Paradise: I move that the answer be stricken and I believe that the conversation should be asked for rather than the conclusion of the witness.

The Court: The answer may go out. It is really a conclusion of the witness.

Q. By Mr. Krasne: From the questions that Mr. Paradise read to you from the deposition when he talked about further negotiations with respect to exclusions, what was your under- [385] standing? What did you think he meant when he asked you that question?

A. May I have that question again?

(Question read by reporter.)

A. At the time of the deposition?

Q. Yes.

A. I thought he meant the excluded items that they kept out and with reference to these small detailed matters that go along with a deal of this character.

(Testimony of Morris Ferer.)

Q. In other words, you mean, after a deal is set, there is sometimes a little give and take? Is that what you meant?

A. That is what happened in this deal.

Q. You didn't mean by the answers that you gave in response to Mr. Paradise's questions in the deposition that, after you had paid your money on January 8th, you were then to sit down and negotiate the terms of this deal with Richfield, is that right?

Mr. Paradise: I believe that is argumentative and leading and suggestive.

The Court: Of course, it is leading but I will let it stand.

A. I certainly did not.

Mr. Krasne: That is all.

Mr. Paradise: That is all.

The Court: I suggest that we take a recess of some 10 or 15 minutes and then take the testimony of Mr. Clements. [386]

Mr. Krasne: We will probably have two additional witnesses whose testimony won't take more than 5 minutes as far as we are concerned.

The Court: Are they in the courtroom?

Mr. Krasne: No. One of them has been called but I haven't had an opportunity to discuss with him what I expect to examine him about.

The Court: Let's take this recess and then we will take the testimony of Mr. Clements.

(Short recess.) [387]

THOMAS HUBBARD CLEMENTS,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Q. By the Clerk: Please state your name.

A. Thomas Hubbard Clements.

Direct Examination.

Mr. Sturzenacker: If your Honor please, as far as this witness is concerned, his deposition is on file and, although I wasn't present at the taking of the deposition, I have read it and I will try to steer clear of repetition.

Q. Mr. Clements, what is your business or occupation?

A. I run the Refinery Equipment Company.

Q. How long have you been engaged in that business?

A. This present company I have run for eight years.

Q. And prior to that time what were you doing?

A. Engineering work of one type and another.

Q. And what kind of engineering?

A. Both chemical, mechanical and gas engineering.

Q. Does that work require your services to be used in oil fields?

A. Occasionally; yes.

Q. Have you ever devoted any special study at any time to the equipment necessary for oil production and oil refining?

A. I took a one-year course in oil production and technology, under Professor Uren, at the University of [388] California at Berkeley.

Q. During the time you have been engaged in the selling of equipment, have you sold at various times production equipment?

A. Oh, yes.

(Testimony of Thomas Hubbard Clements.)

Q. And you have continually dealt in that line of work, have you?      A. Yes.

Q. You originally heard of this transaction, I believe, sometime during the year 1940?

A. No; that isn't correct.

Q. When did you first hear of it?

A. This plant had been standing idle there for many years and as far back as 1938 I contacted Richfield, or in 1937, possibly, to see if we could get some or all of this equipment out of there.

Q. Who did you contact with Richfield? Do you know?

A. I tried various members, Davis and Linhoff.

Q. Who is Mr. Linhoff?

A. Manager of the gas division. And I contacted Day one or two times. He is general manager of refinery operations, I believe his title is, and I contacted their local storekeeper, Mr. McGahan, once or twice away back.

Q. You have testified in your deposition as to the transactions you had with Mr. Davis relative to this from 1938 on, have you not? [389]      A. Yes, sir.

Q. In the latter part of 1940, did you contact Mr. McGahan in connection with this Casmalia property?

A. No. I was working with Mr. Davis.

Q. Did you ever discuss at any time the purchase of the equipment at Casmalia with Mr. McGahan?

A. Not that I remember.

(Testimony of Thomas Hubbard Clements.)

Q. Did Mr. McGahan ever tell you at any time in any conversation that the Richfield Oil Company desired to sell their surface equipment at Casmalia?

A. No, sir.

Q. Were you ever present with anybody else, at which time Mr. McGahan discussed in your presence the sale of this merchandise at Casmalia?

A. Before or subsequent to the signing of the contract?

Q. Before the signing of the contract.

A. No; never before.

Q. After the signing of the contract, did you discuss this equipment and material with McGahan?

A. McGahan came up onto the property and I met him on a Sunday there subsequent to the signing of the contract.

Q. At that time had you started to dismantle anything?

A. No. We were just bringing our crews and equipment in. And we had asked or requested that he meet me there on this Sunday to clarify certain issues as to what lines did or did not go which were sprawled across a map which they [390] gave us as a part of the contract, and yet they were foggy and there was quite a little ambiguity there and we wanted to clarify it before we started tearing into it.

Q. In other words, the map didn't correctly portray where the pipelines were, is that correct?

A. That is correct.

(Testimony of Thomas Hubbard Clements.)

Q. So McGahan came up to identify the lines?

A. Yes; and fix a point of termination.

Q. At that time did he tell you the Richfield only expected to be selling the surface equipment?

A. No, sir.

Q. Did he at that time tell you that the casings in the wells were not to be pulled and were not included in this sale?

A. No, sir.

Q. Did Mr. Davis ever tell you that the casings in the wells were not to be included in this deal?

A. No, sir.

Q. Were you familiar with the work done there by Mr. Anderson on the premises prior to the time that you gentlemen started to work there?

A. Well, in this respect, that I saw part of the stuff that he was removing.

Q. We have introduced in court while you haven't been here a contract between the Richfield and Mr. Anderson, dated March, 1940, for the removal of certain equipment from the [391] various wells. Were you there after March, 1940, and before you folks started to work, and observed any work being done by Anderson?

A. Yes; I was there at least two or three times.

Q. And what work was he doing when you were there?

A. Pulling production strings and removing such things as crown blocks and certain steam pumps and stuff.

Q. The crown block is the mechanical apparatus on top of the derrick, is that right?

A. That is right.



(Testimony of Thomas Hubbard Clements.)

Q. Did you observe any of this tubing that was coming out of the wells?

A. I happened to see one load.

Q. Speak a little louder, please.

A. Pardon me.

Q. In your business of selling equipment, do you sell pipe?

A. Surely.

Q. Are you familiar with the condition of second-hand pipe that is usable upon the market for transporting oil and so forth?

A. Certainly.

Q. And, in your opinion, would this pipe that Mr. Anderson was removing—or what was the condition of the pipe that Mr. Anderson was removing?

A. Excellent. [392]

Q. Are you familiar with the kind of pipe and character and condition of pipe that is used for tubing in oil wells in Southern California?

A. Yes, sir.

Q. In your opinion, was this pipe that he was removing usable for that purpose?

A. Yes, sir.

Q. Did you see any corrosion or rusting of the pipe?

Mr. Paradise: Do you mean on that one load?

Mr. Sturzenacker: Yes.

A. Not on this one load.

Q. You are quite familiar with this Casmalia property, are you not?

A. That is correct.

Q. As you testified in your deposition.

A. Yes.

Q. Are you familiar with the kind of tubing that is in that field and the adjacent properties operating from the same oil pool?

A. Pretty closely because I saw a lot of it put in.

(Testimony of Thomas Hubbard Clements.)

Q. And with respect to the equipment that is being used by other operators in this territory, is it the same class of stuff that was used at the Richfield lease?

A. Yes.

Q. And that is in use at the present time?

A. Yes. [393]

Mr. Paradise: In use where at the present time?

Q. By Mr. Sturzenacker: Whereabouts in relation to this Casmalia-Soladino lease in the Casmalia field are operations still being carried on with the same class of tubing?

A. Right across the wash or draw O. C. Fields is still operating that old Associated lease.

Q. You were in charge of the removal of the equipment there, were you?      A. Yes, sir.

Q. And as to the other equipment that you removed, what was the condition of it?

A. Will you clarify what you mean by other equipment?

Q. How about the buildings?

A. There were two very excellent warehouses on the property and the corrugated buildings such as covered the boiler units were in fair shape. We realized fairly good, I imagine, on the sale of that galvanized material.

Q. How about the pipelines that were on the property that you removed?

A. They were all excellent with the exception of one spot where they went through marsh land there. Very corrosive waters lay in this marsh land.

(Testimony of Thomas Hubbard Clements.)

Q. Were there various pipelines running from the various wells to tanks?

A. Yes; the property was just criss-crossed with them [394] every which way.

Q. Were those on top of the ground or below the ground? A. Largely on top.

Q. And in what condition were those pipelines?

Mr. Paradise: If the court please, I object not only to this particular question but to the line of questions on the basis of materiality. I am wondering if there is any materiality in this lawsuit as to what the actual condition was of certain portions or perhaps all of the equipment after it was taken off. If the court please, if it is material, it may be necessary to bring in rebuttal testimony on that but I can't see that the actual condition, whether it was good or scrap or must be reconditioned or was good without reconditioning it, is material to any of the issues in this case.

The Court: On what theory did you inquire into it?

Mr. Paradise: I was rebutting, in the first instance, some of the examination that was made of Mr. Kelly and of Mr. Davis and, in the second place, as to what the intentions of Richfield were, that is to say, what their opinion of it was rather than the actual condition, first, as to whether its condition was such that it was usable and, second, whether the nature of it, regardless of its condition, was usable in further operations. But what it actually turned out to be I can't see is material unless the plaintiff is trying to prove Richfield made a bad deal because the condition of the [395] equipment was better than Mr. Montgomery and Mr. Kelly thought it was.

(Testimony of Thomas Hubbard Clements.)

The Court: I rather think that this line of testimony that is being offered is to contradict some of the testimony of Mr. Montgomery as to what was the condition of the material, which formed the basis which he stated was one of the reasons why Richfield was desirous of getting rid of it. Is it being offered for any other purpose?

Mr. Sturzenacker: For that purpose and also for the purpose of showing the stuff was in good condition and could have been used for producing the field but that they absolutely abandoned the thought of even producing the field, and I think we can show that. Did Mr. Clements answer that last question, Mr. Reporter?

(Record read by reporter.)

A. Which pipelines are you referring to?

Q. The pipelines running through the field.

A. They were very excellent, as I say, with the exception of those that were submerged in one spot. The production lines leading from the wells to the production tanks and thence to the dehydration plant and then over into finished storage were all in excellent shape.

Q. How about the pipe leading from the storage tanks to the loading platform?

A. It was very excellent.

Q. What was the condition of the tanks, Mr. Clements? [396]

A. Most of them were corrugated iron and those which were filled with oil, which quite a few were, were in excellent shape. Some of them, however, were practically empty and water, rain water, had entered in over a

(Testimony of Thomas Hubbard Clements.)

period of years and corrosion had taken place at the water line and they were shot. I would say that about a third of the corrugated iron tanks had to be scrapped.

Q. And the rest of them were sold as tanks?

A. Yes, sir.

Q. Was there any oil in these tanks?

A. Oh, yes; quite a lot of them had oil in them.

Q. Is it true that the only oil that was in the tanks was tank bottoms?

A. Oh, heavens no; there was a quite a little oil in the tanks. However, it was not as much as we thought originally because a lot of distillate in some of the refinery tanks was floating on top of the water and gave us false readings.

Q. After you folks started to work up there, what, if anything, did you do about getting ready to pull the casing out of the wells?

A. We decided, first, we had to clear the surface of all of these surface production lines which were just criss-crossing all over and clear the ground before we took any steps toward pulling the wells.

Mr. Paradise: May I hear the question?

(Question read by reporter.) [397]

Q. By Mr. Sturzenacker: And after you got the ground cleared, what did you do?

A. We proceeded to call in two or three contractors who specialized in well pulling.

Q. In other words, it wasn't your idea of pulling the wells yourselves?

(Testimony of Thomas Hubbard Clements.)

A. No. We wanted to bring in subcontractors who had special equipment for pulling that casing.

Q. And did you consult with various of these people?

A. Two or three; yes.

Q. And then what else did you do in connection with it?

A. As a matter of fact, we made a contract with Mr. Evans of Long Beach to pull one well as a test to see how his equipment would work out.

Q. Is that Evans or Owens?                      A. Owens.

Q. About when was that?

A. It was in the summer.

Q. The summer of 1941?                      A. Yes.

Q. Up to that time had anybody in Richfield ever told you that the casing in the wells wasn't to go on this deal?                      A. No.

Q. Had any of the employees or officers of Richfield been on the premises at any time when you were there?

A. No. The only time I remember seeing anyone from [398] Richfield was the time Mr. McGahan came up there and met me on one Sunday.

Q. Did you ever talk to any of the people at Richfield, Mr. Davis or any of those people, relative to the exclusion of certain articles and so forth on the lease after the contract was signed?

A. Well, that is kind of involved. On this map which Mr. McGahan came up to clarify there was an exclusion of certain gas lines on that and an exclusion of certain pipelines connected to the production tanks which they intended to keep for a while.

(Testimony of Thomas Hubbard Clements.)

Q. Well, in addition to the stuff that was marked on the maps?

A. No; there was no other discussion.

Q. After you started to wreck the premises, did you determine that some of the stuff that you folks had bought didn't belong to Richfield?

A. I don't remember of any such condition.

The Court: I can't hear you.

A. I don't remember of any such thing.

Q. By Mr. Sturzenacker: Relative to this gas line that was excepted, do you know the condition of the well from which that gas line came?

A. No, sir; I don't know the condition. I never pulled it and wouldn't know.

Q. Did you and Mr. Ferer have any conversation relative [399] to the saving of that gas in the well for the use of the superintendent's house at any time?

A. Yes. When we were originally discussing the recoverable pipe from the wells, he raised the point that we would lose the pipe in those one or two wells which were hooked to this dry gas line and I pointed out to him that the removable casing would be probably in very poor condition in those two wells because they were more or less dry wells and producing primarily gas, and the two-inch line which conveyed that gas from those wells to the superintendent's house had to be replaced by this superintendent about every year or so. The gas as gas was really pure hydrogen sulphide and very highly corrosive and the assumption was that any casing removed from those two particular wells probably wouldn't be of any particular value.

(Testimony of Thomas Hubbard Clements.)

Q. Did this conversation take place at the time or after the inspection of the premises?

A. It took place after because we didn't know until we got the final contract that there was this exclusion on those wells with this connecting line.

Q. In estimating the amount of pipe to be pulled from these various wells, you had taken that into consideration? A. Oh, yes.

Q. Would it be possible to take any of the casing in those wells that were reserved, well or wells that were reserved for the production of gas, without destroying the [400] gas production from the well?

Mr. Paradise: I object to that question, if the court please. In the first place, I think the proposition has been made repeatedly both by the plaintiff and the defendant that there is no provision in the contract expressly reserving the wells, as the question implies, and, second, that there was no conversation about the wells between the parties during the negotiations, either about the wells or the removal of casing from the wells. Furthermore,—

Mr. Sturzenacker: I will withdraw the question.

Q. Was it your understanding, Mr. Clements, after the signing of the contract, that the well or wells from which gas was at that time being obtained were to remain in such condition as that those wells would continue to produce gas for the superintendent's house?

A. That is correct.

Q. And, taking that into consideration, could you still pull some of the casing out without defeating that purpose? A. Correct.



(Testimony of Thomas Hubbard Clements.)

Mr. Paradise: I object to that question, if the court please, on different grounds, that is to say, that the question is entirely incompetent, irrelevant and immaterial and has no effect on any of the issues in this case, which are to determine what the intention of the parties was prior to the execution of the contract and, also, to determine what notice or knowledge or suspicion the plaintiff had of [401] the defendant's intentions; further, that there is a lack of foundation because, as the court knows, there is a statutory requirement that requires the approval of the Division of Oil and Gas of the State of California for the removal of any casing from any well in the State of California. The lack of foundation is that there is no proof of what those requirements in connection with this well or any of the other wells were, and on the further ground that the plaintiff's position and theory of the entire case has been that they intended to abandon the wells rather than to attempt to pull any of the casing without abandonment of the wells. It is acknowledged in correspondence between the parties as well as in the plaintiff's verified pleadings.

The Court: I am not sure that you are discussing the same thing. Do I understand from the pending question that you are merely asking the witness whether, from a purely mechanical standpoint, certain casing could be removed from a well without injuring the hole, is that it?

Mr. Sturzenacker: Without injuring the production of gas from that well, which is strictly mechanical.

The Court: I still don't see that we are concerned with that in this case, since the parties admit that the wells from which gas was being drawn for the superin-

(Testimony of Thomas Hubbard Clements.)

tendent's house, together with any additional wells that might be required for that purpose, were not involved in this deal.

Mr. Krasne: That is not exactly correct, Your Honor. [402] The reservation was of a gas line leading up to a well or wells. Notwithstanding Mr. Paradise's observations a moment ago in support of his objections, one of the famous points urged by Mr. Paradise as to why the parties must have intended to preserve or to exclude the wells was that, since a gas line was specifically excluded and since it led up to a well, it must, therefore, follow that the wells or the casing in the wells were, likewise, to be excluded. I think we can prove by this witness and other witnesses, if necessary, that we could still preserve the gas line, which was the only excluded item for the purpose of serving the caretaker's house with gas, without still losing a portion of the pipe in the wells.

Mr. Paradise: If I could make an observation on that, if the court please, it is my position that that is completely an afterthought on the part of the plaintiff following the hearing on the motion for a summary judgment. The point that was made at that time was that there was no discussion, as shown by the depositions of both Mr. Ferer and Mr. Clements, whatsoever of any of the wells, that is to say, discussion between themselves or between them and Richfield as to the abandonment or non-abandonment of any of the wells to which the gas line ran; that the matter was never discussed between the parties. And I drew the necessary and proper inference from that that the plaintiff did not intend to make any distinction whatsoever; that, if they did intend [403] to pull casing from

(Testimony of Thomas Hubbard Clements.)

the wells, they made no distinction whatsoever between the wells from which the gas was flowing and the other wells, and for that reason that there was a complete absence of the meeting of the minds. And that was one of the bases, if the court please, for the first count of the counterclaim for reformation, and that was that the plaintiff, if the court will recall, if they did intend to abandon wells and pull casing from the wells, did not intend to do so under the provisions of the contract, which require that all be done, that is to say, that all equipment to be dismantled be abandoned, in accordance with the contract.

The Court: Do I understand you to say that the evidence thus far introduced would support a finding to the effect that there was no meeting of the minds of the parties?

Mr. Paradise: Yes, if the court please.

The Court: If such a finding would be made, would that also then entitle the parties to be restored to their position so far as that can be done financially, that is, the position they held before they entered into the contract?

Mr. Paradise: It is not a matter of a rescission of the contract, if the court please. This is a matter of reformation of the contract as to one portion of the subject matter. As to that particular portion, the plaintiff is asserting that that portion is a part of the subject matter. It is the defendant's position that that was never a part of the subject matter under any circumstances; that, in the first [404] place, an interpretation of the contract itself, both on the face of the contract and in the light

(Testimony of Thomas Hubbard Clements.)

of the surrounding circumstances, shows that that was not true, so that there was no occasion for any restoration or placing the parties back in their original position.

The Court: It is not clear in my mind just how you reason this out. If there was no meeting of the minds, shouldn't both plaintiff and defendant be restored to the position they held before they entered into the deal?

Mr. Paradise: No, if the court please; that is to say, there was no meeting of the minds of the parties as to the abandonment of these wells. The proposition on the counterclaim for reformation on the basis of mutual mistake is the basis of the evidence shown in the depositions that the plaintiff, if it did discuss and did consider that it was entitled to abandon these particular wells, never intended to abandon all of them, that is to say, their intention was only to abandon such of them as should be profitable, to add to their profit in the transaction. Now, I say that, when the court reads that evidence and reads that in the light of the provision of the contract, and, as I recall, it is paragraph 2 which recites the over-all conditions of the contract which would be applicable to what subject matter the court determines is covered by the contract, the court will see that that provision of the contract requires the plaintiff to dismantle and remove all the equipment and [405] facilities which are the subject matter of the contract. Now I say that the failure of the meeting of the minds of the parties is the fact that the plaintiff has already testified in this case in the depositions that there was no intention to abandon all of the wells and the plaintiff has already testified, as shown by Mr. Clements' deposition, that they intended to assume no obligation

(Testimony of Thomas Hubbard Clements.)

whatsoever in connection with the abandonment even of the profitable wells. Therefore, I say any failure of the meeting of the minds is only in connection with the matter of the obligation to abandon all or any part of the wells. So there would be no occasion for attempting to rescind the contract.

The Court: Mr. Reporter, may we have the pending question read?

(Question read by reporter.)

The Court: I think the discussion discloses that this line of evidence, while it is open to argument as to what weight should be attached thereto, is, nevertheless, admissible and I will let it stand.

Mr. Paradise: May I add one further point to the objection, if the court please, that is to say, lack of foundation? There is no showing that this was considered or discussed by Mr. Clements prior to the execution of the contract. The way the question is framed it calls for an answer as of the present.

The Court: Would your answer be the same if the question [406] related to the time that you entered into the deal?

A. As I understand it, the question was originally asked in taking the deposition if we would abandon every well.

The Court: I will strike that out. You are not evidently paying attention to what I am asking you. So I will reframe the question. Purely from a mechanical standpoint and nothing else, could the casing in the gas well or wells from which pipelines led to the superintend-

(Testimony of Thomas Hubbard Clements.)

ent's house have been removed at the time you entered into this deal with the defendant without affecting the drawing of gas from such well or wells?

A. It could.

Q. By Mr. Sturzenacker: Mr. Clements, you were not here while Mr. Davis was testifying but do you recall, during 1940, of having any consultations or conversations with him relative to the purchase of this Casmalia property?      A. Several.

Q. And is there any way that you can at this time refresh your memory as to any particular date that you discussed anything with him?

A. I can even prove it by letters and correspondence.

Q. You have that correspondence with you, have you?

A. I have.

Q. Will you just glance at it and refresh your memory as to the date when you discussed the purchase of the Casmalia [407] equipment with Mr. Davis?

A. Yes, sir.

Mr. Paradise: May I see the correspondence?

Mr. Sturzenacker: Yes; you may.

Q. Will you show it to Mr. Paradise, please?

A. Under date of September 25th, I wrote Mr. Davis a letter.

Q. Does that refresh your memory as to when you had the conversation with him?      A. Yes, sir.

Q. And does that refer to the purchase of the equipment at Casmalia?      A. Yes, sir.

(Testimony of Thomas Hubbard Clements.)

Q. Was that all of the equipment or a portion of it?

A. A portion.

Q. And did you bid on it?

A. He wouldn't let me bid on the whole thing. As a matter of fact, he said, if I would bid on these particular items which I needed particularly, that he would take it up with the management and see if he could effect their disposal.

Q. Did he tell you at that time the management had directed him to dispose of all the equipment?

A. No, sir. He said that the purchasing department had been after both the production department and the manufacturing department to get together to dispose of that equipment [408] but he could never get them together.

Q. That was September 27, 19 what?

A. September 25, 1940.

Q. After September 25, 1940, did you have any further conversations with him relative to the purchase of all this equipment at Casmalia?

A. Yes. He told me he would keep me advised and, when the thing was nearing approachment, he would so notify me so I could go up there and look it over again.

Q. And did he notify you finally?            A. He did.

Q. Approximately when was that?

A. About the middle of November.

Q. Between September 27th and the middle of November, did you ever ask Mr. Davis if the property was ready to be sold?

(Testimony of Thomas Hubbard Clements.)

A. On at least three occasions.

Q. Did you ever meet Mr. Davis at any time?

A. Surely. I was in his office many times.

Q. And that was prior to the time that you and Mr. Ferer went in with a check on the 8th day of January, 1941?

A. Correct.

Q. You discussed the purchase of the equipment with him at various times, did you?

A. I not only did that but I purchased two plants in the year or year and a half prior to that from him. [409]

Q. Had you purchased them through him?

A. Yes, sir.

Q. From Richfield?      A. That is correct.

Q. Were those negotiations carried on with him personally or over the telephone?

A. Personally, in his office.

Mr. Paradise: That is, Mr. Davis?

Mr. Sturzenacker: Mr. Davis.

A. Personally, in his office.

Q. The middle of November was the time that he notified you that the property at Casmalia was for sale, is that right?

A. That it was approaching the point, that they were almost at that point, and that there were still some details to be worked out.

Q. And you got in touch with Mr. Ferer?

A. Yes, sir.



(Testimony of Thomas Hubbard Clements.)

Q. How long after that was it before he told you it was actually ready for sale?

A. In the early part of December. I can't place the exact date.

Q. You and Mr. Ferer went up on the property, I believe you testified? A. That is right.

Q. Was it before or after you went up on the property?

A. I had conversations with him both prior and subsequent to that time.

Q. Did he tell you prior to the time you went to the property with Mr. Ferer that the property was now ready to be sold? A. Yes, sir.

Q. Mr. Clements, you testified that you are familiar with various kinds of refining and producing equipment. Is casing in a well considered in the oil fraternity in this locality as part of production equipment?

A. Why, sure.

Q. Is there any other distinguishing classification that casing is put in other than production equipment?

A. None that I know of.

Q. Was there anything particularly—I will withdraw that. Was there anything peculiar or extraordinary about the pipelines that had been installed in this Casmalia lease?

A. Only inasmuch as they were all made of drill pipe, practically speaking. In other words, they were double the normal thickness of lines usually used for production. In other words, they were not standard weight pipe but they were just double weight pipe.

(Testimony of Thomas Hubbard Clements.)

Q. And in what condition were the fittings and unions and other things that were taken from the property?

A. They were in excellent condition.

Q. What happened to those fittings?

A. They were brought to Los Angeles and disposed of. [411]

Q. And where were they disposed of? Do you know?

A. Well, a large portion was returned back to major oil company warehouses.

Q. Did you make those transactions yourself?

A. I made the sales largely; yes.

Q. You sold them? A. Yes.

Q. And do you know for what purpose those fittings and other things, valves and so forth, taken from the Casmalia lease were used by the other companies?

A. Well, they went back into their general warehouses. I don't know where they finally ended up. We had no trouble disposing of them.

Q. In your opinion, Mr. Clements, what were they usable for?

A. Any use that you might require in producing or refining.

Q. Of oil? A. Of oil.

Mr. Sturzenacker: You may cross-examine.

The Court: May I inquire in reference to one of the answers you gave? You said something to the effect that, along about September, 1940, Mr. Davis told you that he had not yet been able to get two certain departments of Richfield together to decide what equipment at Casmalia would be sold. What were those two departments? [412]

(Testimony of Thomas Hubbard Clements.)

A. The production and the manufacturing.

The Court: I can see that the estimate about this witness requiring only a short time is a little bit shy. We will take a recess until 2:00 o'clock this afternoon.

(Whereupon a recess was taken until 2:00 o'clock p. m. of the same day.) [413]

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Afternoon Session

2:00 o'clock

(Appearances as last noted.)

T. H. CLEMENTS

recalled.

Cross Examination.

Q. By Mr. Paradise: Mr. Clements, do you have an interest in this transaction, that is to say, in the Aaron Ferer & Sons part of the transaction in the purchase of the salvage equipment at Casmalia? A. Yes.

Q. What is the nature of that interest?

A. It is predicated on one-third of the net returns from the transaction.

Q. Do you mean that you are to obtain one-third of the profits? A. That is correct.

Q. That is to say, the overall profits in the transaction after sale of the salvage equipment?

A. After all expenses.

Q. Were you to stand any portion of the losses, if there was a loss?

A. We didn't figure on any.

(Testimony of Thomas Hubbard Clements.)

Q. There was no arrangement on that?

A. Not that I recall. [414]

Q. Was this an oral or written arrangement between you and Aaron Ferer & Sons?      A. Oral.

Q. When did that occur?

A. Sometime in the middle of December.

Q. Is it your recollection that you were not to bear any part of the losses if there were to be any losses?

A. It has never been raised. I would stand my portion of any losses, naturally.

Q. I didn't hear you.

A. I would stand any proportion of the losses.

Q. What share?      A. One-third.

Q. Was that your arrangement, then?

A. There was no arrangement like that made but I would do that, naturally.

Q. I was asking you what your arrangement was with Aaron Ferer & Sons.

A. The point was never raised.

Q. Then, the only point that was discussed was the share of the profits?      A. That is it.

Q. I don't know whether I correctly understood you on your direct examination. Is it true that you did or did not have any talks with Mr. McGahan prior to the execution of this contract? [415]

A. I had numerous conversations with him.

Q. I mean about this transaction.

A. None prior to the confirmation of the contract.

(Testimony of Thomas Hubbard Clements.)

Q. Prior to the signing of the contract, do you mean?

A. Well, there was a conversation, where he was present, in your office but none before that time.

Q. Did you have any conversation with Mr. McGahan in Mr. Davis' office?

A. I don't recall whether he was present on the drawing of the preliminary contract or memorandum there or not. I don't recall at the present time. However, I had numerous conversations with Mr. McGahan at his office because I was currently buying merchandise there.

Q. Did you have any conversations with Mr. McGahan at Mr. McGahan's office, during November or December of 1940, in connection with this proposed purchase of salvage equipment at Casmalia? A. No.

Q. You say you did not? A. No.

Q. Do you recall definitely that you did not?

A. Not to my knowledge.

Q. Mr. Clements, do you recall your deposition that has heretofore been taken in this case?

A. Why, sure.

Q. I would like to read to you from that deposition [416] certain questions and answers starting on page 20 and continuing to page 21. On page 20, in line 6, the question was,

"Can you fix the time when the transaction was ready to be bid upon and with whom you had a conversation, with what Richfield employee?

(Testimony of Thomas Hubbard Clements.)

"A.—The last step was when Mr. Davis told me to get in contact with Mr. McGahan and that McGahan would be calling for bids very shortly. I think that was the general context of the conversation.

"Q.—Was that all that was said?

"A.—That is all I recall.

"Q.—Did Mr. Davis outline to you the particular facilities and equipment that were to be sold in that conversation?

"A.—No. As a matter of fact, at that time I don't believe they knew what they wanted to let go; that the thing was more or less indefinite, and hazy."

Then there is an objection, which I will omit.

"Just state, Mr. Clements, what was said to you rather than what you thought. Then what occurred? Did you talk to McGahan?

"A.—Yes; I talked to McGahan.

"Q.—Where did that conversation take place? Was it in the Richfield office?

"A.—In his Long Beach salvage office.

"Q.—Will you state what occurred? Were there just the two of you present? [417]

"A.—Yes. I don't remember talking with him in front of anyone else.

"Q.—And can you fix the time of that conversation?

"A.—Well, it was, I imagine, around the 1st of December, 1940.

(Testimony of Thomas Hubbard Clements.)

“Q.—What was said as closely as you remember?

“A.—He said that I had better go up there and take another look at it; that they would call for bids pretty quick. And I remember at the time asking him if there was any deadline on it and, as I recall, he said there was no definite deadline, although I wouldn’t take oath to that remark. And when it came to that point then, of course, I knew it involved more money than I had, and then I started looking around to see who I could get to help underwrite it.

“Q.—Was there any statement by Mr. McGahan as to what facilities and equipment Richfield was willing to sell?

“A.—As I recall, he said he wanted to sell everything with the exception of six big storage tanks and some other equipment which had previously been sold or was under process of being sold at the time.”

Do you recall that those questions were asked of you at that time?      A. I had forgotten them.

Q. Do you recall whether you gave those answers?

A. After reading it, yes.

Q. You did give those answers to those questions?

[418] A. Yes.

The Court: Where did you stop?

Mr. Paradise: That was at the bottom of page 21.

Q. I believe you testified in connection with Mr. Anderson’s work in the summer of 1940, Mr. Clements, that Mr. Anderson had pulled the production strings from the wells, is that correct?

(Testimony of Thomas Hubbard Clements.)

A. I don't know how far he went. I saw one load of them.

Q. You saw one load?                      A. Yes.

Q. Did you testify whether the production strings had been pulled?

A. No; I didn't testify to it.

Q. Well, do you know whether they were?

A. I have been so informed.

Q. To what do you refer as production strings?

A. These wells were on the pump and it is the two and one-half or three-inch pipe through which the sucker rod works up and down.

Q. Is that what is commonly known as the tubing?

A. Well, sometimes there is another pipe surrounding that which is known as the tubing, in which the gas is subtracted from the well.

Q. Is what you refer to as the production string or the tubing cemented in the well?                      A. No, sir. [419]

Q. Do you know what casing is in an oil well?

A. Yes, sir.

Q. How does the casing differ from the tubing or production string?

A. Generally in size and also as to its usage.

Q. Is it installed in a well differently?

A. As a rule.

Q. Will you describe the manner?

A. As a rule, it is cemented in on the bottom edges to the formation. There are cases, however, in which it is put in with a temporary packer.



(Testimony of Thomas Hubbard Clements.)

Q. I am afraid I didn't understand your answer.

A. There are cases where it is put in with a temporary packer.

Q. But it differs from tubing or the production strings, is that right? A. And in usage.

Q. And in manner of installation, isn't that true?

A. It is installed in the same manner.

Q. And the production or tubing is run in and out of a well very often, is it not, in connection with the production operations and changed during the life of the well?

A. More frequently because of the wear and tear on it.

Q. That is not true of the casing, is it?

A. No, unless there is an earthquake or some other damage occurring to it, which occurs occasionally. [420]

Q. Isn't it true that what is commonly referred to in the oil industry as casing is the pipe that is cemented in an oil well? A. That is true.

Q. Is it not also true that the general usage and common meaning of the phrase "production equipment" in the oil industry is the equipment which is installed in a well after the well has been drilled and after the casing has been cemented, and that production equipment refers and always refers to the equipment that is put on afterwards for the purpose of the operation of the well?

A. I wouldn't say that necessarily followed.

Q. In what respect is that not true?

A. I think any of the pipe used in the performance of a well is production equipment.

(Testimony of Thomas Hubbard Clements.)

Q. I am talking about the usage of the phrase, the common and ordinary usage of the phrase, in the oil industry.

A. I don't believe that is true.

The Court: Can you hear the witness? At times I find it difficult and I am only a few feet from the witness.

Mr. Krasne: It is very hard sometimes.

Q. By Mr. Paradise: What was your estimate of the tonnage of the recoverable casing from the wells on the property, that is to say, the estimate that you made at the time that you testified in your deposition that you made an estimate when you and Mr. Ferer examined the property?

[421] A. Well, we always assumed there would be a minimum of 1,000 tons and upward.

Q. Did you estimate a maximum?

A. No; we never estimated a maximum because I thought there was some wells on the property not properly located on the map.

Q. Isn't it true that you formerly testified that you estimated a minimum of 50,000 feet of recoverable casing and a maximum of 100,000 feet?

A. That is possible.

Q. Well, is that correct or incorrect?

A. Well, we never got down to specific cases. We knew we could get at least a minimum of 1,000 tons under any conditions.

(Testimony of Thomas Hubbard Clements.)

Q. Did you make an estimate of a maximum recovery at that time?

A. We were unable to. No one could do that until they pulled the wells.

Q. Would you say that you did not make an estimate of a maximum?

A. No; we didn't make a maximum estimate at any time as far as I was concerned. As a matter of fact, Mr. Ferer asked me that question and I would not put a maximum on it.

Q. Calling your attention, Mr. Clements, to your deposition, I refer, first, to page 46, starting at line 15, where the question was asked you, "When you talk then about [422] recoverable casing—" I will withdraw that, if the court please.

Starting on page 45, line 19, "Q.—On what basis did you estimate that there were 50,000 feet of recoverable—I will withdraw that. What do you refer to as recoverable casing?

"A.—The amount you can get out of the well and still comply with your abandonment program as set forth by your State Bureau of Mines, their rules and regulations.

"Q.—Do you mean that you cannot take out all of the pipe that is put in a hole?

"A.—Oh, no. You can only take out that which is, you might say, excess above that which is necessary to seal off encroaching waters or oil seepages from one strata to another."

That stops in line 3 on page 46. Then, commencing in line 15 on page 46, "Q.—When you talk, then, about recoverable casing, you mean the quantity that you can take

(Testimony of Thomas Hubbard Clements.)

out over and above the quantity that the Mining Division of the Bureau of Oil and Gas requires to be left in there, is that correct?

"A.—That is correct.

"Q.—That is the quantity you are talking about when you say a minimum of 50,000 feet and a maximum of 100,000 feet?

"A.—That is right."

That terminated in line 23 on page 46. And, on page 59, in line 4, the question was asked you, "What was the tonnage of the recoverable casing that you estimated between [423] the limits of 50,000 feet and 100,000 feet?

"A.—We based it on an average of 10-inch pipe and that pipe would run approximately 40 pounds a foot in those days. That was a rather lightweight 10-inch pipe and, if you took 50,000 feet out, it would be simple mathematics that it would be 50,000 times 40 minimum.

"Q.—That would be a minimum of 1,000 tons, would it not?

"A.—That is right.

"Q.—And a maximum of 2,000 tons?

"A.—That is right."

Do you recall that those questions were asked of you and that those were the answers you gave at the time of your deposition, Mr. Clements?

A. Yes; but we had another idea in mind as well. We were referring only to usable pipe and we knew all of that casing coming out of the wells would not be usable.

(Testimony of Thomas Hubbard Clements.)

Q. Did you state that at the time in this deposition when I asked you how much you estimated you would recover?

A. You were asking the questions.

Q. I asked you, did I not, what the recoverable casing would be? A. Recoverable or usable.

Q. I said recoverable.

A. We didn't know what the maximum recoverable would be and that would be the answer at the present time. I wouldn't know how much the maximum was. [424]

The Court: May I ask where you stopped reading the last excerpt?

Mr. Paradise: That was in line 15 on page 59.

Q. I believe the question was asked of you this morning, Mr. Clements, whether as a matter of practical operation casing could be taken or removed from a well without abandonment, and that you answered that it could, is that correct?

A. That is true; it could.

Q. If I should ask you the same question, would your answer be the same, that casing could be taken out without abandonment of the well?

A. Yes, sir; it could.

Q. I call your attention to your deposition on page 84, commencing in line 14, and will read you the question.

"Q.—Mr. Clements, to remove casing from an oil well, is it necessary to abandon the well, do you know?

"A.—Yes."

That terminates on line 16.

(Testimony of Thomas Hubbard Clements.)

The Court: Again, may I have the page reference?

Mr. Paradise: Page 84, lines 14 to 16.

A. Your Honor, could I say something at this time?

The Court: Have you finished the question?

Mr. Paradise: I was going to read further from the deposition but I will be willing to let the witness make his explanation.

The Court: All right. [425]

A. Your Honor, in an oil well there are generally three or four strings of casing concentric one to the other. If you are abandoning them, you would cut off at progressive steps down, leaving a cement ring from one step to the other, like stair steps. If you wanted to take a center string out of the well, you could still do that and not form a point where you would have an ingress of water. And that is the question he raised when we were speaking of the removal of some casing, not of casing especially on this gas well. If you mean total abandonment, there is a distinction there not brought out. If you mean total removal of all casing, that is abandonment. If you mean removal of a portion of the casing, you could remove that without even reference to the Mining Bureau that you would so remove it later. It doesn't come under the classification of abandonment proceedings.

Q. Mr. Clements, are you familiar with any statutory requirements in California concerning the removal of any casing, any part of casing, from a well located in California?

A. I am.

(Testimony of Thomas Hubbard Clements.)

Q. Do you know what those requirements are?

A. That you must report to the local office of a district not only the removal of casing but even a production string or even a sucker rod.

Q. It is true, is it not, that you cannot remove any of the casing from any well in California without complying with the rules and regulations and the particular requirements as [426] to that well as dictated to you by the Oil and Gas Supervisor of the Division of Oil and Gas? That is correct, is it not?

A. Will you repeat the question, please?

(Question read by reporter.)

A. Well, to the first part of the statement in the question the answer is yes, but I think you have two questions.

The Court: Well, split it into two questions as you understand it.

A. If you made a step which would constitute abandonment as described by the State, you would have to so notify the State before you made that step, but the removal of one piece of production string or any part of a production string—I don't believe you would have to even ask the permission of the State before you made that step. You would have to go ahead and notify the State that you had done so but I don't think you would have to ask their permission before because you haven't involved your neighbors. It is for the protection of your neighbors that the statute is instituted.

The Court: When you used the expression to remove a part of a production string, did you mean any part of the casing in an oil well?

(Testimony of Thomas Hubbard Clements.)

A. Any removal of casing as well as production strings has to be so reported to the State continuously.

The Court: I am afraid you didn't understand the [427] question. A moment ago I understood you to testify to the effect that you may remove a part of a production string without getting permission from any State agency. Is that what you testified?

A. Yes; if there is no hazard.

The Court: When you used the expression "any part of a production string," did you mean thereby any part of the casing in an oil well? A. Yes, sir.

Mr. Paradise: Was his answer yes, Mr. Reporter? I couldn't hear. A. Yes.

Q. Have you ever in the course of your experience in the oil business, Mr. Clements, become familiar with the provisions of the law applicable to the removal of casing or any other operating structure from an oil well?

A. Sure.

Q. Are you familiar with Section 3233 of the Public Resources Code? A. Probably not by number.

Q. I would like to read to you the first paragraph of Section 3233 of the California Public Resources Code and then ask you if you are familiar with that statutory requirement. It says, "Removal of rig, etc.: Notice of intention: Time for notice: Action on notice: Effect of failure to act: Report of work done. No person, whether as principal, agent, [428] servant, employee, or otherwise, shall remove any rig, derrick, or other operating structure, or the casing or any portion thereof, from any well without first giving written notice to the super-



(Testimony of Thomas Hubbard Clements.)

visor or district deputy of his intention to remove such rig, derrick, structure, or casing from such well." Were you familiar with that statutory requirement?

A. Sure.

Q. Had you ever inquired, Mr. Clements, what the requirements of the Division of Oil and Gas would be before any of the casing could be removed from any of the wells in the Casmalia field?

A. Not only that but I went to the Santa Barbara office of the supervisor of that territory and found the Richfield had not—

Q. Just a minute—

Mr. Krasne: Let him finish his answer.

Q. By Mr. Paradise: I want to inquire as to when this examination took place. I want to ask you if you made any inquiry of the Division of Oil and Gas concerning their abandonment requirements at any time prior to the date of the execution of this contract. A. Yes.

Q. You did? A. Yes.

Q. Prior to the date of the execution of the contract?

A. Yes. [429]

Q. The contract was dated, as you know, January 17, 1941?

A. Yes. May I finish my answer?

The Court: May I have the question?

(Question read by reporter.)

The Court: I think that only calls for a yes or no answer. The witness has not as yet been asked to disclose what he ascertained.

(Testimony of Thomas Hubbard Clements.)

Q. By Mr. Paradise: Do I understand, then, that you did make an inquiry of the Division prior to January 17, 1941? A. I did.

Q. What inquiry did you make?

A. I went to the office and asked—or every district has more or less their own rules or at least they have different interpretations. Some divisions are more strict than others. So I went to that office.

Q. To which office?

A. The Santa Barbara office. The original office for that territory was in Santa Maria. So I had to go to Santa Barbara to find out if there was any special stipulations on that district and found that they were very lax in that district; that they were not looking down your neck all the time.

Mr. Paradise: I move that be stricken as a conclusion of the witness and a volunteered statement. [430]

The Court: What he found out is ordered stricken out.

Q. By Mr. Paradise: When did you make that trip?

A. Oh, around November.

Q. In November of what year? A. 1940.

Q. To whom did you talk?

A. To the assistant in charge. The manager was out at the time.

Q. Pardon me?

A. The assistant in charge there. The manager of that district wasn't there at the time.

Q. Do you know the name of the man to whom you talked? A. I don't recall.

(Testimony of Thomas Hubbard Clements.)

Q. Did you talk to him about abandonment of wells?

A. Yes.

Q. Abandonment of the wells at Casmalia?

A. Yes.

The Court: What did you say that assistant's name was? A. I didn't say. I don't recall.

The Court: Tell us what he looks like. Describe him.

A. I have no idea at this late date. I know at the time I went in there he took out the records of the Casmalia field of these Richfield wells and found, to his dismay, that they had had no report on this for about a year. In other words, they didn't have a report even on the production strings. [431]

The Court: The answer may go out except the first words, since it is a volunteered statement, not in response to the question. Can't you give us any description of what this assistant looked like?

A. No, sir; I can't, honestly.

The Court: You don't know whether he was light or dark or tall or short or smooth-shaven or wore glasses or the color of his hair or anything about him?

A. No.

Q. By Mr. Paradise: Mr. Clements, I would like to call to your attention some questions and answers in your deposition commencing on page 100, starting in line 9.

"Q.—Do you know whether the requirements of the Division of Oil and Gas as to the abandonment of wells are stricter and more stringent where you are in an undepleted field than when the field has been completely depleted and all of the oil take out?

(Testimony of Thomas Hubbard Clements.)

"A.—The abandonment of oil wells has been more or less a human factor with the representative of the department in the particular field, I had always been told.

"Mr. Paradise: Would you read the question, please?

"(Question read by the Notary.)

"Q.—I don't believe you answered that question, Mr. Clements.

"A.—Well, I think as to the abandonment program in any oil field that the determining factor is the nature of the [432] oil field and, as you say, the number of surrounding wells and *may* other factors, that is, if it is an undepleted field and there is a surrounding edge of marginal wells still pumping, it is a cinch they are going to be pretty tough on your abandonment program."

Then, turning back—

The Court: Where did you stop?

Mr. Paradise: I stopped on line 1 on page 101.

Q. Then, turning to page 85 of your deposition, commencing in line 14, "Q.—It is necessary, is it not, to abandon a well in accordance with the requirements of the Division of Oil and Gas of the State of California, isn't that true?

"A.—That is the State law.

"Q.—Are their requirements identical with respect to all wells? "A.—No.

"Q.—Did you know what their requirements would be with respect to these wells? "A.—No.

(Testimony of Thomas Hubbard Clements.)

“Q.—Did you inquire of the Division of Oil and Gas as to what their requirements would be with respect to these wells?

“A.—I did not. I had seen wells, on visiting there, abandoned and I more or less could draw assumptions from that.”

I stopped in line 3 on page 86. At the time of your [433] deposition, were those questions asked of you and were those the answers that you gave, Mr. Clements?

A. I believe so.

Q. I believe you testified this morning something with respect to the gas wells, that is to say, that you did not intend to abandon the gas wells. Was that correct?

A. When we went over the property originally, we didn't know there was going to be any exception on these wells. As a matter of fact, until Mr. Ferer and myself received a blueprint of the property from your office, we did not know there was going to be an exception on any of the wells being pulled.

Q. What was your testimony this morning with respect to wells from which gas was flowing?

The Court: Isn't that kind of a broad question?

Mr. Paradise: I believe it is, Your Honor. I couldn't recall his testimony exactly and that was the reason I asked it in that fashion.

Q. Do I understand from your answer this morning that you did not intend to abandon the wells from which gas was coming?

Mr. Krasne: As of what time?

(Testimony of Thomas Hubbard Clements.)

Mr. Paradise: At any time prior to the execution of the contract.

Mr. Krasne: We object to that on the ground it is incompetent, irrelevant and immaterial what he intended to do with respect to abandonment at the time they were looking the [434] property over and before any offer was made or before any of the terms were reduced to writing or before they understood what the contract was.

The Court: If the question is directed to the attention of the witness when the bid was submitted—perhaps he should be asked as to whether he is familiar with that bid which was submitted by the plaintiff in December of 1940. If so, he may be interrogated as to what his intention was at that time and then, also, what his intention was at the time the check was given and any other time when he was present during the subsequent negotiations.

Q. By Mr. Paradise: I would like, Mr. Clements, first to direct your attention to the date on which you and Mr. Ferer visited the property. Was that the date on which you told Mr. Ferer that the casing that might be pulled from gas wells would not be of good value?

A. We didn't specify gas wells on that occasion. We said there would be some of those wells in which the pipe would be so poor that it would not be profitable to pull them.

Q. You mentioned this morning something about the fact that gas coming from a well would have some effect upon the condition of the casing?

A. Yes; that is correct.

(Testimony of Thomas Hubbard Clements.)

Q. And that you told Mr. Ferer about that on the date when you inspected the property, is that correct?

Mr. Krasne: We object to that. That was afterwards [435] because they didn't know anything about the gas line when they were first up there on their inspection trip.

The Court: I think that is an objection followed by an argument which may be misconstrued. Do you recall anything being said by you to Mr. Ferer, while you were inspecting the Casmalia property, relative to pulling casing out of any gas well or abandoning any gas well?

A. Yes, sir.

The Court: What was said?

A. This property lays more or less going up a hill. There was a ravine and on the other side of the ravine there is really a continuation of the same field and that field there is an oil Associated field, now owned by O. C. Fields. And about two years ago O. C. Fields—

The Court: Just a minute. I am afraid you are wasting your time and our time also. Mr. Reporter, will you read the question?

(Question read by reporter.)

The Court: Suppose you read the preceding question and his answer.

(Record read by reporter.)

A. Well, Your Honor, these wells are not—or one well is not a gas well and the next an oil well. Some of these wells are predominantly gas-makers and those wells

(Testimony of Thomas Hubbard Clements.)

are highly corrosive because that gas is approximately pure hydrogen sulphide. In the other wells the oil stands pretty high in [436] the casing and protects the pipe.

The Court: Do you understand I am asking you for a conversation and so far you haven't given it to me?

A. Yes, sir.

The Court: Now, give us the conversation, if you will.

A. I was telling him I had seen eight wells pulled on the same strata on adjacent property and out of the eight wells six of the casings that came out were perfect and two of them were in bad condition due to corrosion from hydrogen sulphide.

The Court: Did you say anything to him on that occasion about pulling the casing out of or abandoning any gas well?

A. We were discussing the probable footage of pipe which we could remove from those wells and we placed the minimum at 1,000 feet and an average of 2,000 feet per well, and we felt that we should get a minimum of wells that could be pulled of at least 40.

The Court: My question is directed not to all the wells but to gas wells and what, if anything, you said to Mr. Ferer on that subject and nothing else while you and he were on the Casmalia property inspecting it.

A. There are no wells on the property which can be referred to particularly as gas wells.

The Court: So you didn't tell him anything about any gas wells?

A. No, sir. [437]



(Testimony of Thomas Hubbard Clements.)

Mr. Paradise: I wonder if I might ask this of the court. Would the court permit a recess? I would like to have the reporter look through his notes and find the part of the testimony that was asked of this witness about those gas wells on direct examination this morning.

The Court: We will take a 10-minute recess.

(Short recess.)

Q. By Mr. Paradise: Did you discuss with Mr. Ferer, Mr. Clements, the abandonment or non-abandonment of wells from which gas was flowing?

A. No.

Q. At no time during the negotiations and up to and including the date of the signing of the contract?

A. I discussed it with him on the date of the signing of the contract in your office, when the point was raised on the blueprint of the retention of two or three of these wells for gas purposes.

Q. Was there any discussion of it prior to that date?

A. None.

Q. But there was discussion of the retention of wells at that date in my office? A. That is right.

Q. Who were present?

A. There was McGahan—well, let me ask a question. You say discussion. The discussion lay between Ferer and myself and not between us and the Richfield. [438]

Q. Was it discussed in the presence of anyone from the Richfield?

A. No. We went to the corner of the room and held a huddle when it came to that point and were discussing it.

(Testimony of Thomas Hubbard Clements.)

Q. Was that within the hearing of anyone from Richfield or was it a private, secret conversation?

A. It was a private conversation.

Q. Pardon me?

A. It was a private conversation.

Q. Will you state what was said between you and Mr. Ferer?

A. During that huddle, we made up our minds we should have stipulated in the contract all metal and wood and everything else on that property, and at the same time the question was raised about these two or three wells, and I told him to forget it because probably the gas had chewed those wells up so that they would probably be valueless anyhow.

Q. What had occurred in the private conversation between you and Mr. Ferer on the one hand and the Richfield representatives on the other which brought up this discussion about the gas wells?

A. Well, at that time you presented to us a map for our inspection, showing exemptions which we hadn't been informed of before.

Q. That exemption was of the gas line running from the superintendent's house to one of the wells, was it?

[439] A. Not only that, but there was exempted pipelines communicating around tanks from the tank farm.

Q. Was there also exempted and was there also discussed the exclusion of a gas line running from the superintendent's house to one of the wells?

A. That is right.

(Testimony of Thomas Hubbard Clements.)

Q. And was that what prompted your private conversation with Mr. Ferer? A. Yes.

Q. Did you tell Mr. Ferer which of the wells the gas line ran into? A. He saw the blueprint.

Q. Did you tell him anything about it? A. No.

Q. Was there a discussion of which wells you were talking about?

A. There was either two or three shown on the blueprint.

Q. You told him there were two or three?

A. The blueprint showed it.

Q. Well, what was your conversation with Mr. Ferer?

A. He wanted to ask privately if we were going to lose any great tonnage by those exceptions and I said no but that we should go ahead and protect ourselves even further by having all metal and wood on the property included in the contract, to be all-inclusive.

Q. You were talking then with Mr. Ferer about two or [440] three wells, is that correct?

A. Not only that but we were speaking of these other lines which were sprung on us at that time.

Q. Did you and Mr. Ferer discuss the numbers of the particular wells to which you were referring, that is, the well numbers? A. No.

Q. In that discussion with any of the Richfield representatives who were present, and I mean the conversation between you and Mr. Ferer on the one hand and the Richfield representatives on the other, was there any discussion

(Testimony of Thomas Hubbard Clements.)

whatsoever of the abandonment of any of the wells on the property or the removal of casing from any of the wells on the property?

A. It was not discussed.

Q. At the time of your examination of the property with Mr. Ferer, what portion of the pipelines was above the ground and what portion was below the ground?

A. I don't know as I can answer that. I couldn't even today, after the removal, tell you the percentage.

Q. Would you say that more than 50 per cent was above the ground?

A. I would say at least 50 per cent of the pipe which we removed was above the ground.

Q. And were the balance of the pipelines under the surface?      A. That is right [441]

Q. Will you tell the court something about valves and fittings that are attached to pipelines? In what manner are they attached?

A. They might be either screwed or flanged.

Q. Are the valves and fittings also attached to that portion of the pipeline that is under the ground?

A. Surely.

Q. Did you examine the condition of the pipelines at any time prior to the execution of this contract?

A. Which pipeline?

Q. The pipelines that you removed as a part of this transaction.

(Testimony of Thomas Hubbard Clements.)

A. We examined all of those in the production area above ground and we looked at all of those in the refinery area above ground and all of those inside of pipes which we could see.

Q. I am talking about the pipelines and the valves and fittings attached to the pipelines.

A. We examined them as far as we could see.

Q. Could you tell the reusable condition of either the pipelines or the valves or fittings without opening the pipelines and looking at them? A. Surely.

Q. You could? A. Yes.

Q. Will you describe how you could? [442]

A. As a rule, in a production line going from a production storage tank, we will say, to a dehydrating plant, there is practically no corrosion taking place in the pipe. The corrosion takes place externally to the pipe.

Q. Are you talking now about something you examined or something entirely aside from this problem?

A. When we examined all of the pipe, we found it good on the exterior and we subsequently found it good on the interior.

Q. Isn't it true that at the time that you examined this equipment prior to the execution of this contract you couldn't tell anything about the condition of that pipe, the pipelines or the valves or fittings, without opening up the pipe and determining what was on the inside of it, whether

(Testimony of Thomas Hubbard Clements.)

the inside had been corroded by the oil or the sulphur or by the water or the steam, isn't that correct?

A. That isn't correct.

Q. In what respect is that not correct?

A. If the pipe has become corroded, it will show leakages at some place or another.

Q. If there were any leakages or corrosion as to the portion of the pipeline underneath the ground, you had no knowledge of that prior to the time you executed this contract, is that correct?

A. That is right. The only pipe we found on examination was poor was the gas gathering lines and the gas disposal [443] lines to the boiler houses. They were all scrapped. We knew that to start with.

Q. When did you open up these pipelines for the first time?

A. When we had a crew up there.

Q. And that was how long after the contract was executed?

A. The first of February, as I recall.

Q. To whom did you sell the pipe that was taken off of the property?

A. Mr. Ferer's office would have the record of that.

Q. Do you know?

A. I know some of the companies to whom I sold; yes.

(Testimony of Thomas Hubbard Clements.)

Q. To whom did you sell it?

A. I sold some to the Kelly Pipe Company and we sold some to some of the local refineries, for instance, we sold some in Santa Maria to practically all of the local refineries, and we sold to the Five C and a plant which has changed its name.

Q. Was the bulk of it sold to the Kelly Pipe Company?

A. Do you mean of the usable?

Q. I am talking of the pipe that was taken off the pipelines.

A. We sold a large quantity to Kelly. Whether they took the bulk I can't answer.

Q. I believe you testified that the pipe was in very [444] good condition with the exception of one small portion of the line, is that correct?

A. That is true, that is, I was speaking of the larger lines.

Q. How much of that line was unusable?

A. Oh, I would say possibly a mile because there were, I think, five parallel lines in this same area and they were from four to six inches in diameter.

Q. How many miles were there clear?

A. I don't remember.

Q. What portion of the lines would you say was unusable when you referred to that part of the line?

(Testimony of Thomas Hubbard Clements.)

A. I would say we had 10 per cent wastage.

Q. And the rest was all usable?      A. Yes.

Q. In what condition?      A. Good.

Q. In good condition?      A. Yes.

Q. Did you recondition the pipe before selling it?

A. No.

Q. Was that reconditioned by the purchaser?

A. Not in the case of the refinery. They went ahead and used it.

Q. No. I am talking about the Kelly Pipe Company.

A. The Kelly Pipe Company always recondition their [445] pipe.

Mr. Paradise: I would like to offer a photostatic copy of a letter agreement between Aaron Ferer & Sons and the Kelly Pipe Company, dated February 7, 1941. Is there any objection to this being used rather than the original?

Mr. Krasne: None at all.

Mr. Paradise: May it be stipulated that this may be offered in evidence?

Mr. Krasne: Yes.

The Court: It may be marked Defendant's Exhibit C. Mr. Reporter, will you read the statement of counsel as to the offer?



DEFENDANT'S EXHIBIT NO. "C".

Scrap Iron All Types  
and Metals Waste Materials

[Emblem]

AARON FERER & SONS

(Established Since 1895)

5585 East 61st Street

(At Slauson and Eastern Avenue)

Los Angeles, California

Telephone ANgelus 1-6141

February 7, 1941

Kelly Pipe Company

525 North Mission Road

Los Angeles, California

Attention: Mr. C. E. Ulrich

Gentlemen:

This letter will be considered as an addenda to your order No. 12984 of January 30, 1941, concerning the purchase of certain pipe, together with the terms of payment.

The price of all pipe selected by you is at the rates set forth below, based on \$41.20 per ton, F.O.B. cars Los Angeles; all pipe to be measured before loading on cars at Casmalia, such measurements to be the ruling factor in settlement.

¾"	1.13#	per ft.	at \$41.20	per ton cars L.A.—	\$2.33	per cft.
1"	1.684#	per ft.	" " " " "	—	\$3.469	" "
2"	3.678#	per ft.	" " " " "	—	\$7.576	" "
2½"	5.819#	per ft.	" " " " "	—	\$11.987	" "
3"	7.616#	per ft.	" " " " "	—	\$15.688	" "
4"	10.889#	per ft.	" " " " "	—	\$22.431	" "
6"	19.185#	per ft.	" " " " "	—	\$39.521	" "
Any 6"	heavier than standard			—	\$43.00	" "
8"	25.00#	per ft.	at \$41.20	per ton cars L.A.—	\$51.50	" "
8"	28.00#	per ft.	" " " " "	—	\$57.68	" "
Any 8"	heavier than 28.00#	to be figured as				
28.00#	or			—	\$57.68	" "

(Defendant's Exhibit No. C)

2—Kelly Pipe Company—Mr. C. E. Ulrich

10" —35.00#	per ft. at \$41.20	per ton cars L.A.—\$72.10	per cft.
10" —40.00#	per ft.	" " " " " —\$82.40	" "
Any 10" pipe 40# or heavier to be figured as			
40# pipe or		—\$82.40	" "

Kindly sign the copy herewith, if acceptable, retaining the original for your files.

Very truly yours,

AARON FERER & SONS

By Morris Ferer.

KELLY PIPE COMPANY

Accepted By: C. E. Ulrich.

MF:L

[Stamped]: Deft's Ex. No. "C". Filed Sep. 11, 1942.

(Record read by reporter.)

Q. By Mr. Paradise: Mr. Clements, can you tell me the entire quantity, that is to say, the quantity expressed in terms of tonnage, of the pipe that was taken off of the property in your operations?      A. I cannot.

Q. Can you tell me approximately?

A. I cannot.

Q. Do you have any recollection whatsoever of it?

A. No. We loaded the cars and as far as the book-keeping is concerned that was handled by Mr. Ferer's office.

Q. You supervised that operation up there at the property, did you not?

(Testimony of Thomas Hubbard Clements.)

A. The removal and the loading of the cars and the [446] sales.

Q. And the sales? A. Largely.

Q. And you have no recollection whatsoever of the quantity that was taken off?

A. No. I heard the testimony of Mr. Ferer this morning that there was a total of 1,100 tons but I don't know that of my own knowledge.

Q. If that was true, that it was 1,100 tons, what portion of that was pipe?

A. Oh, I would say 80 per cent.

Q. 80 per cent? A. I would think so.

Q. Then, 80 per cent of 1,100 tons would be the percentage, which would arrive at a quantity of 900 tons of pipe, is that correct? A. I would estimate that.

Q. Do you know how much pipe was sold to the—I will strike that. Is it not correct, Mr. Clements, that the quantity of pipe that was accepted by the Kelly Pipe Company under this contract which is Defendant's Exhibit C was approximately 500 tons of pipe?

A. I wouldn't know.

Mr. Sturzenacker: I object to that. The document speaks for itself.

Mr. Paradise: The document does not show the quantity [447] that was either delivered or sold.

A. I wouldn't know.

Q. You don't know?

A. No. I haven't the record.

(Testimony of Thomas Hubbard Clements.)

Q. Do you know what quantity of pipe was accepted by the Kelly Pipe Company as usable pipe, in good condition?

A. Oh, they got pretty tough on their rejections there for quite a while and we had several cars which came in that we sold to the Imperial Pipe Company and to various other pipe companies.

Q. Do you know what percentage of the pipe was rejected by the Kelly Pipe Company?

A. No; I don't.

Q. Is it not true that approximately half of the pipe was rejected by the Kelly Pipe Company as not being considered by salvage and used pipe companies as No. 1 used pipe?

A. I don't believe they rejected it all for that reason. They rejected a lot because it didn't conform to standard specifications of pipe.

Q. Did they tell you that?

A. They not only told us that but they penalized us, for instance, on certain tonnages of that pipe which didn't conform to standard specifications.

Q. Who told you that the pipe was rejected for that reason, who of the Kelly Pipe Company?

A. The question of why they rejected it wasn't told to [448] us. They went up there and had their man on the job and he said, "We want this and we don't want that."

Q. Who was that man?

A. Mr. Herman Stone and Mr. Phillips.

(Testimony of Thomas Hubbard Clements.)

Q. They told you what?

A. That they wanted this pipe and didn't want that pipe. But we could sell it anyhow and didn't care.

Q. Did they tell you why they rejected it under this contract?

A. Some of it was quite obvious and others it wasn't.

Q. I am asking for the reasons that they stated to you.

A. Some pipe was rejected because they said it was inferior and some of it was rejected because it was what is called bastard sizes.

Q. Wasn't it true that approximately half of the pipe was rejected by the Kelly Pipe Company because it didn't qualify as No. 1 used pipe but only came in the category of Nos. 2 and 3 used pipe?

A. I wouldn't know why they rejected it.

Q. They didn't tell you that? A. Not all of it.

Q. Do you know what those numbers referred to?

A. Yes; sure.

Q. What did they refer to?

A. That pipe which can't be used for No. 1 is classified as No. 2 but, as a matter of fact, in the grading of pipe it [449] depends on the market. I would say a No. 2 grade six months ago is A No. 1 today.

Q. I am talking now about the time this pipe was offered to them for delivery under this contract, Defendant's Exhibit C.

A. They were awfully fussy about it in those days because there was a surplus on the Los Angeles market.

Mr. Paradise: I move that be stricken, if the court please.

(Testimony of Thomas Hubbard Clements.)

Mr. Sturzenacker: I think it is responsive to the question.

The Court: May we have the question read?

(Question read by reporter.)

The Court: The answer may go out.

Mr. Krasne: The first question that the reporter read was, "What did they refer to?" If I remember correctly, the question just ahead of that was "Do you know what the various classifications are?" Starting at the point the reporter started, it sounded as if it meant what did these men of Kelly refer to. I think one question ahead of that will show what he referred to as these various classifications rather than the conversation.

The Court: Do I understand you have just been asking the witness what these designations, classes 1, 2 and 3, referred to at the time of the deal with the Kelly Pipe Company? [450]

Mr. Paradise: That is correct.

The Court: Did you understand the question to mean that?

A. No, sir. I thought it was general.

Q. By Mr. Paradise: I will ask you just what did classifications Nos. 1, 2 and 3, refer to at the time of your contract, that is, at the time of the contract between Aaron Ferer & Sons and the Kelly Pipe Company.

A. It would refer to the best grade, the ordinary grade and the very poor grade, of pipe.

Q. Is it not true that classifications Nos. 2 and 3 of used pipe refer to pipe which is either pitted or corroded or unusable even as line pipe in pipelines?

(Testimony of Thomas Hubbard Clements.)

A. No. 2 pipe used to refer to that which was rough, not particularly pitted, because it didn't take threads so well, but as of today—

Q. No. I am talking about as of the time of your contract.

A. As of that time, the No. 3 grade was practically only used for fence posts and like material.

Q. Is that not also true of No. 2? A. No, sir.

Q. Can No. 2 also be used as line pipe in pipelines?

A. Yes; it is very often used in that way.

Q. Referring to the pipe that was accepted by the Kelly Pipe Company, or the portion of it that was accepted, was that reusable as such in the manner in which you delivered [451] it to them?

A. Sure. If they wanted to put it back in the pipeline, that is a cinch. They would not have to clean it up.

Q. I thought you testified before—

A. I said that they did do it. You asked the question whether it was necessary. I don't say it was necessary.

Q. You mean you could move something through it; that it wasn't clogged? Is that what you mean?

A. It wasn't clogged. We just had oil on the interior and they burned all of that oil so it might be used as a water line or for any other purpose.

Mr. Paradise: I believe that is all.

Redirect Examination.

Q. By Mr. Sturzenacker: When you referred a little while ago in your deposition to recoverable casing,

(Testimony of Thomas Hubbard Clements.)

do you mean that pipe that would come out of the ground or do you mean that pipe that would come out of the ground that could be used again for casing?

A. No; I wasn't referring to that pipe coming out of those wells as casing in the sense it would be used as casing today because that casing was all lapweld casing and they don't use that any more. It is an obsolete type and today it is only usable for pipe in pipelines.

Q. So the casing you were talking about recovering there would be reused and resold as pipe? [452]

A. As pipe.

Q. And that that was not usable as pipe would be sold as what?

A. It could be used for culverts. The very porous, of course, would have to be scrapped for remelting.

Q. At the time you went to Santa Barbara the first time to talk to the Division of Oil and Gas about abandoning these wells, did you receive any instructions from the office up there as what would be necessary to do to abandon these wells?

A. No, sir. They told me the whole thing was up to the manager of that Division; that I would have to come back here again and see him.

Q. When you testified in your deposition and stated that you did not know what requirements the Division up there was going to impose on you, was that because of the fact that you had not received any instructions yet from the Division of Oil and Gas?

A. That is correct. I would have to have specific instructions.



(Testimony of Thomas Hubbard Clements.)

Q. When was the next time you went back to the Division of Oil and Gas? Do you recall?

A. As I recall, it was about the first week in April or the end of April.

Q. Do you know the manager's name there?

A. No, sir.

Q. If I told you it was Mr. Dolman, would that refresh [453] your recollection?

A. Yes; that is correct.

Q. Did you see Mr. Dolman at that time?

A. I didn't see him but this same fellow was there. There was only one man in the office when I was there on both occasions.

Q. Did you go back to the office later?

A. No. Instead of going back the third time, we sent either two or three well-pullers in there to get the specific instructions. In other words, we decided, rather than going back there, we would get the men who were going to do the actual abandonment work to go in there and get the instructions from Dolman direct. So I did not return the third time but sent this man from Long Beach, Owens I believe was his name, to get the specific instructions.

Q. So, as a matter of fact, even at the present time you have never received instructions from the supervisor in that district as to what is going to be necessary to abandon those wells? A. That is correct.

Q. Mr. Paradise read to you your testimony at the taking of the deposition relative to the conversation with Mr. McGahan some time about the 1st of December.

(Testimony of Thomas Hubbard Clements.)

After reading that deposition to you, did that refresh your recollection that you did have a conversation with Mr. McGahan or that you did not have? [454]

A. I probably did. The thing is that I was in McGahan's office about once every week anyhow, checking on other purchases.

Q. All during this time?                      A. Oh, sure.

Q. And you may or may not have discussed this Casmalia deal with him?                      A. Yes.

Q. Had Mr. Anderson finished his work when you folks went up to look at the property?

A. No, sir; he hadn't finished cleaning up the property.

Q. And by the time the contract was signed and you went up there to start removing, had Mr. Anderson finished his contract?                      A. No, sir.

Q. Was he still working?                      A. Yes, sir.

Q. What was he doing?

A. Burning up rubbish and hauling off various parts of derrick timber and stuff.

Mr. Sturzenacker: That is all.

#### Recross-Examination.

Q. By Mr. Paradise: One other point, Mr. Clements. I didn't quite understand what you said you were referring to when you referred to recoverable casing. [455]

A. What was the question?

Q. What do you refer to as recoverable casing?

A. Any pipe that would be in those wells after Mr. Anderson had finished and we could take out I term recoverable casing.

(Testimony of Thomas Hubbard Clements.)

Q. Do you mean that recoverable casing is the quantity of the casing that is cemented in a well, which you can recover and take out of the well, or, when you say recoverable casing, do you mean that it was limited only to that portion of the quantity, that you took out, which is salable as usable pipe?

A. Well, I used that terminology in both ways, I think, in my testimony. Where we removed some casing and it just collapsed and fell apart, we certainly wouldn't call it hardly casing where it would go in the scrap bin, and we were pretty well assured that some of it would be in that shape.

Q. Referring to that part of the casing that you recover from an oil well, say half of it was salable as pipe and the other half would be scrap. Now, do you refer to recoverable casing as meaning all of it or only the half being salable?

A. We also referred to it as that portion which we could remove from the well and yet conform to the rules and regulations of the Mining Bureau.

Q. Isn't it true that that is the only meaning, common, ordinary meaning, in the oil industry, that is to say, the portion that can be taken out and still qualify with the [456] requirements of the Division of Oil and Gas, and that it doesn't mean just the portion that you recover which is salable?

A. That is probably true.

Mr. Paradise: That is all

Mr. Sturzenacker: That is all. Mr. Ferer, take the stand again. [457]

MORRIS FERER

recalled.

Direct Examination.

Q. By Mr. Krasne: Mr. Ferer, have you had occasion during the last recess to refresh your recollection concerning the amount of money that you have thus far realized from the sale of materials which you salvaged from the Casmalia deal?      A. I have.

Q. And what have been the gross receipts which you have enjoyed as of this time from that property?

Mr. Paradise: If the witness is testifying from records I believe that the defendant should be given the opportunity to examine those records, if the court please, in order to permit proper cross-examination.

The Court: That would seem to be a proper criticism.

Mr. Krasne: I think that Mr. Paradise certainly is entitled to access to those books. I will say, frankly, I didn't have the books brought in and I just asked this witness if he has refreshed his recollection so he can now testify from his own knowledge, after having refreshed his recollection. Counsel is certainly entitled to access to those books.

Mr. Paradise: If it would be acceptable to the court and in order to expedite the matter, I would be glad to meet with Mr. Krasne and we will submit to the court a statement on that matter.

Mr. Krasne: That is quite agreeable. [458]

The Court: Upon examination of the plaintiff's books?

Mr. Paradise: Yes.

(Testimony of Morris Ferer.)

Mr. Krasne: That will be very satisfactory. That being the case, I take it that it is counsel's desire and the court's desire to have me refrain from asking any questions of this witness at this time and we will try to stipulate to it.

Mr. Paradise: Yes.

Mr. Krasne: Very well; that is all.

Mr. Paradise: May I ask Mr. Ferer some questions, if the court please? I realize it is not proper cross-examination but, in view of Mr. Clements' testimony, I would like to ask Mr. Ferer two or three questions about the conversation which he related.

The Court: Very well.

Cross-Examination.

Q. By Mr. Paradise: Mr. Ferer, did you hear Mr. Clements' testimony concerning a conversation which occurred in my office about the exclusion of certain wells?

A. I did.

Q. Did that conversation occur as Mr. Clements stated it?

A. I don't remember in detail at that time that particular type of conversation. The gas line was mentioned but, as I mentioned before, I didn't give it much thought because it [459] was of such small value. And we discussed the question of not having an attorney and that everything goes. I don't remember that particular conversation, though.

Q. Isn't it true that you have formerly testified in this case that you did not know to how many wells the excluded gas line ran? A. That is correct.

(Testimony of Morris Ferer.)

Q. And did you not also testify that you did not think that it would be necessary to keep in operation well No. 36 to which the gas line marked in red on the map runs?

A. I told you that I knew nothing about the mechanics of gas wells or any other kinds of wells.

Q. Did you not also testify in this case that you did not know that the gas going through the gas line to the superintendent's house came from any of the wells on the property?

A. That is correct.

Mr. Paradise: That is all.

Mr. Krasne: Step down, Mr. Ferer. Mr. Goodrich, please take the stand. [460]

MORRIS DAVIS GOODRICH,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name.

A. Morris David Goodrich.

Direct Examination.

Q. By Mr. Krasne: Mr. Goodrich, you are related to Mr. Morris Ferer, are you not?

A. I am.

Q. What is the relationship?

A. Brother-in-law.

Q. Did you have occasion to take a motor trip with Mr. Ferer up to the Casmalia property?

A. I did.

Q. When was that?

A. I believe it was the first Sunday in January, 1941.

Q. And who accompanied you on that trip?

(Testimony of Morris David Goodrich.)

A. Mr. Ferer and Mr. Hyman Ferer, his brother, Mr. White and myself.

Q. Did you meet anyone else there?

A. Yes; we met Mr. Clements there and also—

Q. Where is Mr. Hyman Ferer now, if you know?

A. Mr. Hyman Ferer is in Omaha.

Q. What was the purpose of this trip?

A. Mr. Ferer had negotiated some transaction and he [461] wanted to show it to his brother, as well as myself, while his brother was visiting here; and we all went up to the job.

Q. When you arrived there, did Mr. Ferer show you anything?

A. Yes. Mr. Ferer and his brother, Mr. Hyman Ferer, and myself and Mr. White and Mr. Clements who was there walked considerable distances all over that area and we had seen various boiler houses and various pipe runs and a lot of other debris and other things laying around on the job. And I recall walking up to the superintendent's house at the time. And there was a map taken out. I believe it was the superintendent who had this map. It was a great big, large white map and it showed various runs of pipe and conduits and one thing and another. And I remember Mr. Clements calling to our attention that there were so many—

Mr. Paradise: If the court please, I object to any conversation that this witness may relate. I haven't objected up until now.

Mr. Krasne: I haven't asked him about any conversations, although I will. I think you are quite right.

(Testimony of Morris David Goodrich.)

Q. Did you have any conversations there with Mr. Ferer with respect to the equipment that he was describing as having purchased?

Mr. Paradise: I object to that on the ground of lack of proper foundation and also that it is hearsay.

Mr. Krasne: I think it is probably hearsay to the same [462] extent to which all of the conversations introduced by the defendant are hearsay. I think they are about in the same category. It is to show what Mr. Ferer had in mind, as to what he thought he had in mind.

Mr. Paradise: I believe there is quite a vital difference. Mr. Ferer has already testified who were the interested parties in the transaction as far as the plaintiff is concerned, and he testified as to the members of his partnership and Mr. Goodrich is not a member of the partnership. So any conversation Mr. Ferer had with anyone not connected with the transaction or the negotiations would be completely hearsay and incompetent.

The Court: When did you say this occurred?

A. This was the first Sunday in January.

The Court: It sounds like it was a trip which followed the submission of the bid and prior to the meeting in the office of counsel and the drawing of the formal contract. It might be termed an inspection trip. I will let him answer.

Q. By Mr. Krasne: Will you please relate the conversation?      A. Which conversation?

Q. The conversation in which Mr. Ferer discussed with you the items of merchandise or equipment that he had purchased.



(Testimony of Morris David Goodrich.)

A. Can I carry on from where I left off?

Q. Yes. [463]

A. When we got to the superintendent's house and this map was brought out, Mr. Ferer pointed out to me that all that conduit that was visible as well as the conduit that was underneath the pipes at the time was part of this transaction. And at that time, or prior to that, we had passed several wells and it occurred to me that, being a layman—

Q. Just relate your conversation.

A. I had asked Mr. Ferer, "How do you take out that kind of a pipe?" That the oil came up through these vertical pipes and whether or not it could be used as salvage. And Mr. Ferer told me it wasn't a very difficult job; that Mr. Clements had made all arrangements for that job of work and was well equipped to do it.

Q. Did Mr. Ferer say anything about whether or not he had bought that pipe?

A. Definitely Mr. Ferer told me all of that pipe shown on that map, as well as certain runs of pipe that didn't show, because those maps were rather old and they had made considerable additions to those pipe runs. Mr. Clements and the superintendent of that property up there admitted or agreed with him that there are certain runs of pipe that had been added to various other runs that would definitely not show on that print because the print was rather old. And it was my definite belief—

Q. Never mind your belief. Just state the conversation. Was there any further conversation? [464]

(Testimony of Morris David Goodrich.)

A. Not other than that.

Mr. Krasne: You may cross-examine.

Cross-Examination.

Q. By Mr. Paradise: Had you ever seen that map you referred to before?     A. Never.

Q. Have you ever seen it since?     A. Never.

Q. Would you be able to identify it if you saw it?

A. I have a vague recollection of it.

Q. Do you know whether that is the same map that is attached to this contract?

The Court: You are showing the witness what exhibit?

Mr. Paradise: The map attached to Plaintiff's Exhibit No. 4.

A. I don't believe this was the one. It looks very much like it but it was a much older looking paper.

Q. Did you have any conversations with any Richfield employee or representative?

A. Yes; the formal conversation of introduction to the Richfield superintendent on the job.

Q. That man didn't discuss with you the terms of this transaction, did he?     A. No, sir.

Q. Or he didn't discuss with you the items to be sold, [465] did he?

A. There was discussion with Mr. Clements on the pipes.

Q. No. I mean with the Richfield watchman.

A. Is that the superintendent you are referring to?

(Testimony of Morris David Goodrich.)

Q. Yes.

A. There was considerable discussion with him on the pipe runs.

Q. Do you mean the pipelines?

A. The pipelines underneath, that don't show on the map.

Q. Do you mean just the surface pipelines? You are not talking about the wells, are you?

A. The wells and the pipelines were all one as far as I was concerned. That is what they were discussing.

Q. I am not asking you for your opinion. I just wondered if you had any discussion with the watchman there about the oil wells. A. I did not.

Mr. Paradise: That is all.

Mr. Krasne: That is all. Mr. White, take the stand.  
[466]

HARRY WHITE,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name.

A. Harry White.

Direct Examination.

Q. By Mr. Krasne: Mr. White, by whom are you employed? A. Aaron Ferer & Sons.

Q. How long have you been employed by that firm?

A. For five years.

Q. What is your capacity with that company?

A. Plant manager.

(Testimony of Harry White.)

Q. Did you hear Mr. Goodrich testify concerning a certain trip made to Casmalia the first Sunday of January, 1941?      A. I did.

Q. Were you on that trip?      A. I was.

Q. Were the same people present that Mr. Goodrich testified were present?      A. Yes.

Q. Were you present at a time when there were any discussions or convesations between the persons there with respect to the material or equipment on this Casmalia job?      A. I was. [467]

Q. Who was present at the time of any such discussions?

Mr. Paradise: If it will shorten this matter, I will stipulate this witness' testimony will be the same as that of Mr. Goodrich.

Mr. Krasne: So stipulated. Thank you.

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Mr. Krasne: If the court please, I think, as this matter has extended and we have found we would not be up against as short a time as I first thought we would be when the matter of procedure arose, the plaintiff is willing to submit the case as it now stands on both the question of the interpretation of the contract, if your Honor still feels that that matter is open and not decided, and upon the question of the defendant's cross-complaint with respect to reformation. In other words, so far as we are concerned, on the subject matters short of the question of damages, this is our case.

The Court: As I understand it, you desire to furnish, by way of stipulation, certain data to be ascertained from an examination of the plaintiff's books.

Mr. Krasne: Yes; except that item, your Honor.

The Court: I would like to have counsel brief the case. Would this be satisfactory, that, since we really have the plaintiff chargeable with the case as made out by the complaint and the defendant, of course, having the laboring oar with reference to the affirmative issues raised in the answer, that briefs be filed simultaneously, with the proviso that [468] you may also file answering briefs to the matters which may be said to be affirmative issues raised by the respective parties? In other words, the plaintiff would be expected to argue the case as it is presented by the complaint and the answer, exclusive of the affirmative issues raised in the answer and the opening brief, and the defense counsel would be expected to discuss the affirmative issues raised in the answer, and then both sides would be entitled to reply, so that we would have a subsequent brief from the plaintiff answering the matters raised in defendant's brief in respect to the affirmative issues of the answer and we would have an answering brief from the defense with respect to the matters raised by the complaint.

Mr. Krasne: That is satisfactory, your Honor.

Mr. Paradise: That is perfectly satisfactory.

The Court: What time is suggested for those briefs?

Mr. Krasne: I think that would depend somewhat upon when we might expect a transcript of these proceedings

from the reporter. The last time we discussed such a procedure, I think we found ourselves preparing our brief before we had the transcript.

The Court: The reporter says he will need ten days.

Mr. Paradise: Would 30 days following the receipt of the transcript be satisfactory?

The Court: Why not assume that the reporter's transcript will be furnished to you by the 21st and that the first [469] briefs will be filed, then, by October 21st and then the answering briefs—what date do you suggest?

Mr. Krasne: Probably two weeks for each of us.

Mr. Paradise: That will be satisfactory.

The Court: That would mean, then, that the answering briefs would be filed by November 4th. I would like an opportunity to examine the briefs to indicate to counsel whether I would like to have you cover any points orally after I examine the briefs or not. For that reason I am suggesting that the matter be put on the calendar for submission, unless you are advised that oral argument is requested, for November 16th at 2:00 p. m.

Mr. Krasne: I should like to make an unusual request. In order to save time and expedite the filing of these briefs, Mr. Paradise has been good enough heretofore to loan me his copies of the depositions. I wonder if there is any reason why Mr. Sturzenacker and I could not borrow the originals from this court until such time as our briefs has been prepared, which will save a great deal of time. We didn't order copies originally and didn't

know that they would ultimately play as important a part in this case as they have. I mean the depositions. If I said something else, I am sorry.

The Court: I see no objection to that.

Mr. Paradise: In order that there may be no misunderstanding, if the court please, Mr. Krasne has just referred [470] to a stipulation concerning the plaintiff's books, that is to say, as to the gross amount of revenue. I had not planned on stipulating to it in the sense that I felt that it was admissible. It was my understanding I would agree as to the amount but I made an objection this morning to the introduction of similar evidence and I think it is still incompetent and immaterial. May our stipulation as to the results of the records be subject to that objection?

Mr. Krasne: Yes, of course, as far as I am concerned. In other words, there are two items, No. 1, the gross receipts from the material thus far sold, and the gross costs to date. In other words, those are the two items to establish whether at this moment there was a profit or loss.

Mr. Paradise: Well, no—

The Court: May I interrupt to say this? When you go into the subject matter of the costs, I am wondering to what extent that evidence would be entitled to much, if any, persuasive character or weight unless the plaintiff's records were to detail the extent to which those costs arose by reason of weather conditions or delays occasioned by other causes. Just to take the gross receipts and the gross costs I am afraid would leave the picture incomplete.

Mr. Krasne: It would be meaningless for me just to prove the gross receipts from superficial records. It might indicate an entirely different picture than I expected the evidence to portray. I am not interested in proving how much [471] money Mr. Ferer has collected from the sale of equipment thus far unless I can at the same time show that it has cost him more than he has collected. I think the court might well take into account as a practical matter certain variables in costs. But we are not in an accounting action. We are trying to find out what the plaintiff had in mind and I think the general picture of just how much he had realized and how much it had cost him to realize that and, therefore, how much he had lost or gained is material.

The Court: Without knowing why it became necessary to expend various sums that were involved in those costs, I am wondering what we could do with the cost figures.

Mr. Krasne: I was going to have Mr. Ferer testify in some detail as to the breakdown. I think we can show that the loss was sustained because there just wasn't very much merchandise.

Mr. Paradise: My objection went further, if the court please, in addition to what has already been mentioned by the court, to the fact that the testimony would be absolutely meaningless in the absence of original estimates and comparing the final result with the original estimates. And Mr. Ferer has testified in his deposition, which is now a part of the record, that it was a guessing contest and, when he guessed as to the quantity, he didn't know if he was 50 per cent right or 200 per cent right or 1 per



cent right and that he made no estimate of costs. In a situation of that sort, [472] I can't see how the final result has any significance whatsoever. He might just have made a bad guess.

Mr. Krasne: I didn't mean to extend this argument but that guessing business can be taken a little bit too literally. Guessing between 3,000 and 6,000 tons is one thing but ending up with 1,100 tons on another theory is an entirely different matter.

The Court: That much, of course, is in the record. I am just wondering will there be evidence from which one may be able to determine to what extent the costs which ultimately were expended compare with the costs which were taken into account when this bid was submitted by plaintiff.

Mr. Krasne: I think, if Mr. Paradise and I were to make an effort to find out from those figures, it could be ascertained how much were normal costs and how much were extraordinary costs.

Mr. Paradise: I can't undertake to do that, if the court please. It is a question of the comparison of the final result with what they originally had in mind.

The Court: I think we ought to do this much, to allow the plaintiff at least to submit his offer subject, of course, to inspection of plaintiff's records by defense counsel and, of course, subject to such objection as defense counsel feels he should interpose; and then I think that, when the offer is submitted, of course, as it will be in writing, that at the same time the defendant ought to indicate [473] what, if any, objections will be interposed and the grounds thereof.

We will take an adjournment at this time. [474]

In the District Court of the United States, for the Southern District of California, Central Division.

Aaron Ferer & Sons, a copartnership, Plaintiff, vs. Richfield Oil Corporation, Defendant. No. 1718-H.

Deposition of David Zeidenfeld, a witness produced, pursuant to the written notice on file herein, on behalf of the defendant in the above-entitled action, now pending in said court, before H. A. Dewing, a Notary Public in and for the County of Los Angeles, State of California, at Room 1221 Richfield Building, 555 South Flower Street, Los Angeles, California, on Friday, February 13, 1942, commencing at the hour of 10 o'clock a. m.

Present:

Philip N. Krasne, Esq.

and

Carl Sturzenacker, Esq.,

For plaintiff.

Robert E. Paradise, Esq.,

For defendant. [1\*]

DAVID ZEIDENFELD,

a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

Q. By Mr. Paradise: What is your name?

A. David Zeidenfeld.

Q. Will you state your address, Mr. Zeidenfeld?

A. Business or residence?

Q. What is your business address?

A. 10047 South Alameda, Los Angeles.

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\*Page numbering appearing at foot of page of original deposition.

(Deposition of David Zeidenfeld.)

Q. What is your home address?

A. 1027 South Crescent Heights Boulevard.

Q. During the years 1940 and 1941 were you employed by Aaron Ferer & Sons?

A. I was employed for the whole year of 1940, and a month or two, or a couple of months of 1941.

Q. That is, the first two months of 1941?

A. Yes.

Q. In what capacity were you employed? What were your duties?

A. I was a buyer.

Q. Buyer what?

A. Scrap material; scrap and salvage material.

Q. For Aaron Ferer & Sons?

A. For Aaron Ferer & Sons. [2]

Q. From whom would you make such purchases?

A. From any industrial companies, junk companies, and so forth.

Q. Did you solicit any oil company for the purchase of salvage equipment, on behalf of Aaron Ferer & Sons?

A. Yes, I did.

Q. Did you solicit any purchases of such types of equipment from the Richfield Oil Corporation, during that time?

A. My purchases during that time were solely scrap, with the exception of that material in this case, which I didn't exactly purchase, and as to which I have gone into a few dealings with Mr. McGahan as to what it might contain.

(Deposition of David Zeidenfeld.)

Q. The other purchases that you speak of were of salvage equipment, from Richfield?

A. They were junk material on a tonnage basis.

Q. Did you discuss those matters with Mr. McGahan?

A. Practically always before the purchase was made he had to show the material, before it could be bid on, so we usually discussed the materials that were to be sold, with Mr. McGahan.

Q. What was the first occasion that you discussed with Mr. McGahan the equipment and facilities belonging to the Richfield Oil Corporation at Casmalia?

A. In about September, maybe the middle of September, or toward the end of September, 1940, Mr. McGahan mentioned [3] to me about the Casmalia deal coming up.

Q. That was a conversation with Mr. McGahan, which you are talking about?

A. That was purely a conversation, where we did not go into anything about it, because of the fact I felt that it was not time for the deal to come up yet, so I thought I would wait until such time as it was brought to a head really.

Q. I am asking solely concerning the conversations, Mr. Zeidenfeld, rather than what you felt at the time. This conversation that you mentioned, where did that take place?

A. At Richville.

Q. At Mr. McGahan's office?

A. That's right.

Q. Do you recall what Mr. McGahan said at that time?

(Deposition of David Zeidenfeld.)

A. "I think we are going to have a pretty good size deal to work on. We are just working on the records right now, and it isn't exactly ready yet, but I will let you know when it comes up."

Q. Did Mr. McGahan state what types of equipment or materials were to be sold?

A. All I remember at that time that Mr. McGahan mentioned was an oil refinery, either to be sold as a unit, or to be sold in individual lots, by the company.

Q. Did he mention the nature of the types of equipment to be sold? [4]

A. At that time I think that was not. I don't know whether it was clear in his mind yet whether or not Richfield was going to keep a lot of its material, or whether they were going to sell it as a whole. I didn't exactly understand what it was all about until a couple of months later.

Q. At that conversation did Mr. McGahan state what the types of equipment were that were to be sold, whether they were to be sold as a unit or piecemeal?

A. That I don't remember, because it was something that wasn't even checked over between he and myself. I just waited a couple of months after, when the deal started to come to a head.

Q. Did Mr. McGahan state the equipment to be sold was to be surface equipment?

A. At that time, if I remember right, there was supposed to be a lot of various types of refinery and producing equipment. As to what they consisted of, there might have been a few details, but I did not pay any attention to that as yet.

(Deposition of David Zeidenfeld.)

Q. You don't recall whether or not he stated that the equipment to be sold was surface equipment?

A. Not at that time. There may have been some mention a little later on of something like that, but I don't recall exactly.

Q. Do you recall what was said in that regard?

A. Are you referring to the first conversation on this [5] deal, or are you referring to a later conversation?

Q. I am now referring to the first conversation that you had with Mr. McGahan concerning the proposed sale at Casmalia.

A. There wasn't really much said. I don't think we discussed the thing over two or three minutes, and there couldn't have been very much said at that time.

Q. Do you recall anything more specific as to what was said at that conversation than you have already stated?

A. That is about all I can give definitely. To give you a little clearer picture about this, during that time I was not discussing this with Aaron Ferer & Sons. They had purchased some scrap iron, and items of that nature, in the yard, and I happened to be there with them at the time this was just casually brought up.

Q. At the conclusion of your conversation did you make any report to Aaron Ferer & Sons concerning the proposed sale of the Casmalia equipment that Mr. McGahan had mentioned to you?

A. To get a clear picture of this, I used to come into the office of Mr. Ferer every day, and I would casually remark "There is a deal coming up here" or "There is

(Deposition of David Zeidenfeld.)

a deal coming up there", but there was quite a bit of that, and I just dropped quite a bit of these things until the deal was ready to be figured on.

Q. In your activities on behalf of Aaron Ferer & Sons [6] were you interested in large deals or small deals—that is to say, transactions involving large quantities of equipment, or small quantities?

A. Most of the deals were in small quantities, because there weren't any too many large quantities of it. We were interested in any deal, of whatever size, that would come up.

Q. Were you more interested in deals involving large quantities of equipment than you were in deals involving small quantities?

A. Naturally I was more interested in large quantities of equipment than small.

Q. Did it indicate to you that the particular sale Mr. McGahan mentioned to you involved a substantial quantity of equipment? A. Yes, it did.

Q. Did you report that particular proposed sale to Mr. Ferer?

Mr. Krasne: I object to the question as assuming facts not in evidence. At that time there wasn't a proposed sale, if I understand the witness correctly; there was just a casual conversation. In other words, Mr. McGahan said maybe the deal would be coming up, in the first discussion.

Q. By Mr. Paradise: Did Mr. McGahan inquire of you at this first conversation we have been discussing, whether Aaron Ferer & Sons would be interested in making a bid on that purchase? [7]

(Deposition of David Zeidenfeld.)

A. I think he did. I told him "I think they would be interested."

Q. Did you report to Mr. Ferer any of that conversation which you had with Mr. McGahan?

A. The only thing, I might have reported to Mr. Ferer, inasmuch, as I have mentioned before, there were so many deals coming up, small and large—the small ones actually took place, whereas the large ones went by the wayside—but I don't think he took much notice of this, if I did bring it up to him.

Q. Do you recall whether or not you did bring it up to him?

A. During the evening I used to come around there, and there would be salesmen in there. It didn't mean anything, and I just dropped it then.

Q. Did you mention to Mr. Ferer anything about the conversation you had with Mr. McGahan?

A. I might have mentioned this: That Richfield has got a fairly good sized deal coming up in the future, but I don't think they are ready for it yet. Whether I mentioned just the word "Casmalia" at that time, I don't remember.

Q. Did Mr. Ferer inquire of you as to the nature of the deal?

A. He might have asked what the deal consisted of, and I told him it was just a complete refinery.

Q. Did you mention anything to Mr. Ferer at that time [8] about the quantities involved?



(Deposition of David Zeidenfeld.)

A. There was no mention of the quantity, because I did not know anything about the quantity, whether it was a small refinery or a large refinery. All I was told was that there was a lot of equipment up there, and I just passed it off until such time as he would be ready to put it up for sale, because Richfield in the past, whenever they would bring up anything for sale, or mention was made about dealings, I usually waited until the thing came to a head, because it takes so long before any such dealings actually take place.

Q. But in this case did I understand you to say that you did mention this transaction to Mr. Ferer?

A. I mentioned practically every transaction to him, but most of the transactions just drop by the wayside until they are ready to come up for sale. Whether Mr. Ferer remembers that or not, I couldn't say, but I do remember saying that there was a Richfield deal coming up, a fairly good sized deal, but nothing about Casmalia at that time.

Q. Did you describe to him the location?

A. So far as the location, I think I inquired of Mr. McGahan the location. I know it was around Santa Maria.

Q. Did you mention that to Mr. Ferer?

Mr. Krasne: I object to that as having been asked and answered. The witness testified, in response to counsel's question, if he said anything at all about the deal, all he [9] said was that there was going to be a big deal coming up soon.

The Witness: Repeat the question.

(Question read by the reporter.)

(Deposition of David Zeidenfeld.)

A. I might have, but inasmuch as it is close to a year ago, I don't recall the exact wording of my answer to him.

Q. By Mr. Paradise: Do you recall anything more specific about your conversation with Mr. McGahan than you have mentioned?

A. At the time the conversation actually took place, I don't think it took over 30 seconds to say what I have just told you in about five or ten minutes. It was just dropped by the wayside until a future date.

Q. What was the occasion of your next discussion with Mr. McGahan concerning the proposed sale of equipment at Casmalia?

A. If I may ask this—did you ask when?

Q. Yes. A. About how long after that?

Q. Yes.

A. I believe it was in the early part of November, No, exactly November 28th I saw Mr. McGahan regarding Casmalia.

Q. Where did that conversation take place?

A. At the same office where the first conversation took place, at Richville. [10]

Q. Was there anyone else present besides you and Mr. McGahan at that conversation?

A. No, Mr. McGahan and I were alone.

Q. Did you visit Mr. McGahan's office, or did he ask you to come to the office?

A. I think I was there on another deal of some scrap Aaron Ferer & Sons had purchased from them, and I happened to be in the office discussing that deal, and this was just brought to my attention.

(Deposition of David Zeidenfeld.)

Q. In so far as that conversation concerned the sale of Richfield equipment from Richfield's Casmalia property, what was said between you and Mr. McGahan?

A. I think at that time Mr. McGahan was compiling a sort of an estimate as to what he might have up there for sale.

Q. Do you mean he was compiling it while you were in his office, or that he had already compiled it?

A. Whether he had completed the compilation—is that the correct pronunciation of it—at that time, or whether he was still compiling it during that time, I don't recall, but I do remember that a little later on, about the 28th of the month—I think it was one of the last times I had seen him on that deal, I think at that time he had got most of the information, although during the entire stages he was giving me a little information at a time, as he was getting it out of the place. [11]

Q. As I understand it, you had other discussions with Mr. McGahan about this transaction, subsequent to the first conversation, which I think you said was September, 1940, and prior to this particular conversation on November 28th?

A. No, I think there might have been some casual remarks made about that, but on November 28th, in my date book, I do have written, "Richfield, Casmalia." That is all I have noted, so I must have seen him on that date.

Q. What do you recall about this conversation that took place between those two dates, that is to say, between your September 1st date, and November 28th? Were those conversations that took place in Mr. McGahan's office?

(Deposition of David Zeidenfeld.)

A. They were conversations on scrap dealings that we were having. It took a month or two to clean up sometimes, so I was around there maybe once a week or twice a week, and I wouldn't find him in, but when I did find him in I don't remember bringing up anything about Casmalia; but he might have mentioned "I think I will have some more information for you in a few days."

Q. Between the conversations which took place between those two dates did Mr. McGahan give you any specific information about the nature or type of equipment to be sold at Casmalia?

A. Not any more than I told you in answer to your prior question.

Q. He never mentioned that he had more information? [12]

A. If I remember correctly, I believe Mr. McGahan was taking down information from that plant; every trip he went up there he found another lot of equipment to be listed, and he just added to his estimate what he thought might be there. About the first couple of weeks of December I think he had it completed, if I remember right.

Q. Before this conversation took place on November 28th did Mr. McGahan show you any of those estimates, or give you any information that he said he had obtained during that time?

A. He might have showed them to me, but I really did not take any notice of the things.

Q. Referring again to this conversation on November 28th, was there any discussion on that occasion of the nature of the equipment to be sold?

(Deposition of David Zeidenfeld.)

A. That's the date written in my date book to see Mr. McGahan; whether I saw him on the 28th, or saw him a few days after that, I don't remember, but I have in the date book, written down, November 28th and December 23rd. Those are the only dates I have got written down as to when I had seen him. Whether I had dropped in between those dates, I don't recall exactly as to the dates, because it is a little hazy so far as I am concerned.

Q. Then you don't recall whether this conversation you mentioned actually took place on November 28th?

A. It might have been a day or two days after that, or [13] on that date.

Q. In that conversation was anything said by either you or Mr. McGahan as to the nature of the equipment to be sold from from the Casmalia property?

A. The nature of the equipment that was mentioned, if I remember correctly, was a lot of pipe that they had up there. There was mention of pipe lines. There was no specific tonnage at that time mentioned yet. I think it was maybe a few days after that when he had his compilation and estimate just about ready to be shown. When the actual bid started, I don't actually recall it, but I do know it was in the month of December that bids were to be opened, so he might have had it completed at that time.

Q. I want your recollection as to what was discussed at that meeting we are talking of, which, as I understand, occurred either November 28th—

A. —or a few days afterwards.

(Deposition of David Zeidenfeld.)

Q. Will you just state what the conversations were about; what was said?

A. What was said at that time, I believe that he mentioned that the refinery has a lot of pipe lines and other items up there to be sold. There might have been a few pumps maybe which Richfield may want to keep, or whether they were going to sell them. Whether that was a few days before, I don't remember. At that time I think he mentioned there was a lot of pipe up there, a lot of lines—the word “lines”; I don't think the words “surface equipment” was ever used, [14] but the average fellow—

Mr. Krasne: Just a moment. Will you repeat what was said; not conclusions?

A. All the conversation, really what he said—

Mr. Krasne: One minute. To make my point clear, counsel has asked you to give a conversation between yourself and Mr. McGahan on this subject matter. I ask you please to limit yourself to that conversation.

A. Let's see. I should like to go back a little bit, to make it a little straighter. Read that over again.

(Answer read by the reporter.)

Mr. Krasne: Excuse me once more, so this witness can understand what he is expected to do in response to a question of that kind: If you can remember what was said by Mr. McGahan and what was said by you, that is what Mr. Paradise has asked you for. If, in fact, you don't remember, then you are perfectly free to say so, rather than conjecture as to what may have been said.

(Deposition of David Zeidenfeld.)

A. Is it all right if we just strike out after the word "pipe lines" or something like that, so far as I am concerned, and then I will go on from there?

Mr. Paradise: The reporter is taking down your entire testimony, Mr. Zeidenfeld. If you want to make any correction as to what you have already said, that is perfectly satisfactory. I want your recollection of the conversations that took place in Mr. McGahan's office at that time.

A. I believe I asked Mr. McGahan for the amount of [15] tonnage that he might have in this complete job, in figuring the business of a deal of this nature, and I believe at that time he mentioned that we have approximately 1,500 tons of material there, which is purely an estimate, which might contain 900 tons of pipe and 600 tons of steel. And I asked him what the pipe consisted of. He said the steel consisted mostly of some loading racks and the refinery proper, if I remember correctly. As far as what the pipe consisted of, there wasn't too much talk about that, inasmuch as to whether or not it was pipe in wells or pipe in lines; it was just so many tons of pipe.

Q. I think you are anticipating the question, Mr. Zeidenfeld. Was there any mention whatsoever of pipe in wells?

A. I don't recall any mention of pipe in wells, between Mr. McGahan and myself.

Q. Do you recall any mention of casing, the casing in oil wells?

A. That I don't believe I heard mention of there at that time. The word "pipe" itself, to an average fellow

(Deposition of David Zeidenfeld.)

in the junk business, whether it is casing or just a line of pipe or other pipe is designated, when a lot like that is bought up, it is so many tons of pipe.

Mr. Paradise: I move to strike the answer as not responsive to the question, and a mere conclusion of the witness.

Q. At that time did you know there were any oil wells [16] on the property?

A. I did not know what was on the property. I had never been there. I did not personally know there were any oil wells on the property at all.

Q. You did not know? A. No.

Q. You did not have any oil wells in mind at all at this conversation with Mr. McGahan, isn't that correct?

A. I don't believe I did.

Q. Had you seen the property?

A. I had never been up.

Q. Did Mr. McGahan state there were any wells on the property?

A. He might have, but I did not take any notice of it.

Q. Do you know whether he did or not?

A. I don't remember if he did.

Q. But you did not know there were any wells on the property?

A. No. I knew there were some wells, but whether or not they were on this property, I don't recall. At that time he says, "We're going to sell a lot of equipment on the property." Whether he mentioned all the equipment on the property, I don't remember. That is hazy.



(Deposition of David Zeidenfeld.)

Q. Did Mr. McGahan state at that conversation that the equipment to be sold was surface equipment?

A. That I don't recall. [17]

Q. I believe you stated, in answer to an earlier question, that at your first conversation with Mr. McGahan, when he first mentioned that certain equipment would be sold from Casmalia, that you do not recall whether he used the phrase "surface equipment" at that time, but you do recall that he used it at a subsequent conversation?

Mr. Krasne: Just a moment. Counsel is putting words into the mouth of the witness. The witness did not say that Mr. McGahan had used the words "surface equipment" at a later time.

Mr. Paradise: I believe the record will show to the contrary, Mr. Krasne. But I want the witness to state whether Mr. McGahan used the phrase "surface equipment" at the first conversation that you had with him, or at a subsequent occasion, and if so, on what occasion.

A. I don't remember the words "surface equipment" being used. I remember "pipe lines" being used, and I remember "a lot of pipe" being used. Inasmuch as I did not know anything about the property in general, pipe to me just meant so many tons of material.

Q. Did you understand, in your conversation with Mr. McGahan, that the equipment to be sold was any other than surface equipment?

A. Truthfully, inasmuch as I did not know there were any oil wells, I believed they were pipe in lines.

(Deposition of David Zeidenfeld.)

Q. You stated Mr. McGahan mentioned there was pipe [18] and pipe lines. Did you mean by that that Mr. McGahan mentioned pipe in addition to pipe lines, or that the property he was referring to was pipe lines?

A. During the conversation there were so many tons of pipe mentioned, and maybe he mentioned pipe lines. The word "pipe" in general struck me, inasmuch as I was interested in any type of material.

Q. Did you understand, when he used the word "pipe", or he used the word "property", he was referring to anything other than pipe line?

A. My assumption was, practically 99 per cent of all people figure that pipe is usually pipe lying either under the ground or on the ground on a horizontal plane.

Q. By that do you mean pipe line, or something else?

A. Usually pipe lines.

Q. Was there any mention of other than pipe lines in this conversation?

A. So far as I recall, there was no mention other than pipe lines; just pipe connecting two different—

Mr. Krasne: Just a moment. Just what was said; not the conclusion you draw.

Mr. Paradise: Just a moment. I would like to have the witness answer the question.

The Witness: Will you re-read it?

(Question read by the reporter.)

A. Pipe connecting two different points. [19]

(Deposition of David Zeidenfeld.)

Mr. Paradise: I would like to have the last three questions and answers read, please, Mr. Dewing.

(Record read by the reporter.)

Q. By Mr. Paradise: Did you understand at that conversation that either you or Mr. McGahan were discussing anything other than surface equipment?

A. I, in my own mind, thought that surface equipment was what this material consisted of.

Q. Did you gather that from anything that Mr. McGahan said?

A. Inasmuch as he said there was pipe, I usually refer to pipe as pipe lying on the ground, because I am not in a position to figure any other pipe. I never did figure that before.

Q. Did you come to the conclusion that this was surface equipment from anything else that Mr. McGahan said?

A. Well, there was just generally what I believed it was, in a few remarks that he might have mentioned at that time; he might have mentioned a line or so, once in a while, here and there, and so forth. Specifically, I was only interested in how many tons of pipe there were there; how many tons of steel there were there.

Q. Did Mr. McGahan state that the tonnage that you mention, of approximately 900 tons, consisted of pipe lines?

A. Well, as I recall, it was just pipe. He might have mentioned pipe lines, but I don't recall the exact [20] word, but there was just 900 tons of pipe.

(Deposition of David Zeidenfeld.)

Q. Did he describe the length of those pipe lines, or the sizes of them?

A. He did mention a few times that there were a few sizes, but I did not take any heed as to the size, because all pipe is so much a ton, whether it is small or large, depending on how much labor there is in taking them up as to what they might be worth.

Q. Did Mr. McGahan show you any documents at that time?

A. He asked me to come around the desk, a few times, and showed me specific instances of this and specific instances of something else, but all through this deal I, in my own mind, was figuring actual tonnage. That was the only thing I was trying to get out of it—how many tons of which item was for sale.

Q. Mr. Zeidenfeld, I will show you ten sheets of penciled memoranda, and ask you if those are the memoranda which Mr. McGahan showed you at that time?

A. What is the last question, please?

(Question read by the reporter.)

A. Do you want that question answered yes or no, or do you want me to explain?

Q. You can answer the question; then you are entitled to give any explanation you like.

A. These are the sheets shown me, but I don't recall all of them. I know he had all of them in his book; or was [21] supposed to have had them all; and I remember his showing me some instances of this "1500 tons". I remember that "Total Estimate", and I specifically re-

(Deposition of David Zeidenfeld.)

member he showed me a lot of pumps on one of these pages, and as far as the pipe, what he has here marked "Footage & Weights are approx." and "Production" and "Refinery", I did not take any notice as to whether the pipe was in lines or casing, but my assumption was that this pipe was in pipe lines, but I don't recall the exact footage; that did not enter into it. I was primarily interested in this 1500 estimate. I don't recall taking any figures down on this either.

Q. When you said you did not remember whether this pipe was in lines or in casing, did you have casing in mind at that time?

A. To tell you the truth, I did not know the difference between line pipe and casing, at that time.

Q. When you talk about casing now, you are talking about casing in oil wells, are you not?

A. Just a few days ago I was told that casing was casing in oil wells. I have heard casing used many times. I am not exactly an oil man, and I never knew a lot of terms, and I can't determine whether it is pipe that goes up and down, or goes straight across.

Q. I think you are making a lot of assumptions, Mr. Zeidenfeld. I believe you testified that you did not know there were any oil wells on the property? [22]

A. That's right.

Q. Did you mean by your answer—

A. I am not referring in that answer to casing—just casing in wells, or whether it is casing in lines, or anything else. I just happened to use that term. Maybe I was mistaken; if you want to put it that way.

(Deposition of David Zeidenfeld.)

Q. When you said you were examining a particular page upon which footages and sizes of pipe were shown, that you did not know whether that was casing or pipe lines, did you mean that you had that question in your mind at the time you were examining this document?

Mr. Krasne: Just a minute. I object to the question upon the ground it assumes facts not in evidence. This witness has not testified that he examined these records. His testimony was that these sheets, which counsel has in his hand, might have been sheets, probably were the sheets, that Mr. McGahan had; and Mr. McGahan showed them to him. He did not testify that he had made any examination of them. In fact, he testified that the thing he was interested in was the total tonnage. The estimate showed approximately 1500 tons of materials.

Mr. Paradise: I think, Mr. Krasne, you are referring to a different answer of the witness. I will ask that the record be read. The witness answered the question concerning his examination of the penciled memoranda which were referred to. [23]

Mr. Krasne: If you want to do that, all right, or if you want to get the record straight, just ask the witness whether he did examine these, and to what extent; then we will know.

Q. By Mr. Paradise: When you answered the question, Mr. Zeidenfeld, and stated that when you were discussing the footage of the pipe that was mentioned, and stated that you did not take any notice whether the pipe was in line or in casing, you were not considering any oil wells upon the property at that time, were you?

(Deposition of David Zeidenfeld.)

A. I did not know there were any oil wells upon the property.

Mr. Paradise: I ask that the reporter mark as Defendant's Exhibit 1 for identification, each of the ten sheets which I have shown the witness. I suppose it will be satisfactory to mark them all as Exhibit 1, in the aggregate?

Mr. Krasne: Yes; mark them for identification only.

Q. By Mr. Paradise: Did Mr. McGahan show you all of these sheets?

A. He opened his book, and he came to a page where he had a certain item, and he might have turned over a few more, he showed me certain things that he thought I might be more interested in.

Q. Would you state which particular ones of these sheets, which are marked consecutively in the lower right corner—which ones of those Mr. McGahan did show you? [24]

A. This first sheet I saw, because I saw this "1500 tons" here.

Q. That is sheet No. 1?

A. Sheet No. 1. Whether there was a circle around this "1500 tons" at that time, I don't recall, or whether it was since put on. I remember he had another sheet in here with the pumps—can I look at this? Mr. McGahan then kept turning these sheets. He might have pointed out something that did not make any difference; he said there was one item and another.

(Deposition of David Zeidenfeld.)

Q. Do you recognize these sheets as the ones you looked at on that occasion? A. I recognize the sheets from the top sheet, and from these other sheets. These other sheets were just in between there, in that same handwriting. As long as it pertains to the same subject, I presume I must have glanced at these as he turned them over, sheet by sheet.

Mr. Krasne: So that the record will be clear, counsel is asking whether you can swear under oath today that these sheets which you have in your hand are the actual sheets that you saw in Mr. McGahan's office on that occasion; that you are positive that they are; not a surmise or conjecture.

A. I wouldn't want to swear under oath that these are the exact sheets. I don't know whether those are the exact ones. They look like the sheets I have seen, but I don't remember. Take this page with the word "Cas-malia" [25] on it and "Production" and "Refinery", concerning pipe—

Q. By Mr. Paradise: What is the page number of that, marked in the lower right hand corner?

A. No. 7.

Q. Do you recall that you examined that sheet?

A. I did not examine it.

Q. Did he show it to you?

A. He showed me "Here is a lot of pipe here", and so forth, and things like that. I asked him, "How many tons have you got in the whole lot?" He said, "There should be about 900 tons of pipe, but I did not take any



(Deposition of David Zeidenfeld.)

estimates of the footages, or anything like that.” I don’t remember about the 900 tons, whether it just covered this sheet, or whether that and other accompanying lines he had not yet figured. He figured there would be approximately that pipe on the property.

Q. Can you identify sheet No. 1 as having seen that?

A. I can identify the 1500 tons, but I don’t remember any of the other items. I did not go through these sheets; I was just looking for something as to specific tonnage—what was in the whole thing. There is one other sheet I think I could identify, if I could find it, concerning pumps, if it is still here. It is sheet No. 8. I wouldn’t want to swear under oath that I had seen this sheet, but there were a lot of pumps listed on this complete page of pumps. I believe at that time he told me the company is [26] selling a few off, a little at a time, to some buyers that wanted them, or they might want to keep a few of these, but this list is practically a list of all to be sold. Whether it will be sold or not, to go ahead and figure on it anyway.

Q. In what form were those sheets kept?

A. They were kept in a little loose leaf binder. They were not in the loose form they are in now.

Q. Do you recall that that was the size of the sheets you examined?

A. I believe that was.

Q. Is it your best recollection that these are the sheets that you examined?

A. Like I said, I wouldn’t swear under oath that they were, but they look like them.

(Deposition of David Zeidenfeld.)

Q. Did Mr. McGahan give you his book, or make it available to you, so that you could make your own examination of them?

A. No, I was sitting at one end of the desk, and he was at the opposite end. I walked around to the other end of the desk, and he showed me a few instances concerning certain things over there. Some penetrated, and some didn't. So far as my penetration went it was to the effect of the tonnage on the property.

Mr. Paradise: I offer these ten sheets as Defendant's Exhibit No. 1. [27]

[Defendant's Exhibit 1, appearing in the record at this point, is identical to Defendant's Exhibit B, heretofore printed at pages 387 to 397, and is therefore omitted.]

Mr. Krasne: I object on the ground that no proper foundation has been laid; incompetent, irrelevant and immaterial. For the purpose of making my objection clearer, I would like to ask the witness a few questions on voir dire with respect thereto.

Q. By Mr. Krasne: If I understand you correctly, Mr. Zeidenfeld, when you were at Mr. McGahan's office, some time the latter part of November, I believe you said Mr. McGahan had a loose leaf book that had some documents in it?

A. He kept all of his records in a book. I believe these were in the same book as where he keeps his records of all his travelings around different parts of the country, and estimates on other jobs he has in mind, and also store records, probably.

(Deposition of David Zeidenfeld.)

Q. How much time did you spend looking at the sheets in the book which Mr. McGahan directed your attention to? A. I might have been there all told maybe 15 or 20 minutes at a time, just discussing, not primarily one deal, but there might have been two or three other things coming up, but actually I did not examine them the way an engineer would examine the sheet, and look all the way through them.

Q. Counsel has shown you this morning, something over a year after you were first shown this book, ten pages with considerable writing and compilations in small figures, is that right? A. That's right. [28]

Q. Would you say that on the occasion that Mr. McGahan showed you the book that you read all of the items on the pages that he showed you?

A. I did not.

Q. As a matter of fact you did not then, and you do not now know what those pages said, is that correct?

A. If I had to remember it from memory, I couldn't give you a word for word picture of any of the pages.

Q. At the time you looked at the book you did not read those pages, did you, except for the total estimates?

Mr. Paradise: I object to the question as contrary to the witness' statement. It assumes facts not in evidence.

Mr. Krasne: This is a question on voir dire. I want to find out whether the sheets should go in evidence.

The Witness: Do you want that in just the form of a yes or no answer, or an explanation?

(Deposition of David Zeidenfeld.)

Mr. Krasne: You can explain your answer, Mr. Zeidenfeld. Answer yes or no, and then you can explain.

A. Specifically I looked at it in the form of an estimate in total tonnage, but Mr. McGahan, if I remember correctly, tried to explain to me certain information pertaining to what might be up there—pertaining to pumps, and what might be up there pertaining to those. I kept repeating over and over to him “How many tons are there?” He tried to define to me certain different types of pumps, certain different types of other items on the lease, and I [29] told him, “I don’t understand a lot of stuff you are talking about.” We used to joke around quite a bit about it. He showed me the pages. They look exactly the same. I did not see all of them; I saw just one or two or three of them. He kept turning the pages to show me. The main thing I was interested in, if I remember right, on one of those pages he said “We haven’t got the full 900 tons of pipe listed on this page,” but I think he had 600 and some tons of pipe on one. That is something that stands out a little clearer, but he says “There will be roughly I think 1500 tons, of which 900 tons is pipe.”

Q. I direct your attention to Defendant’s Exhibit for identification No. 1, these ten sheets. Will you swear under oath today that the writing on all of those ten pages is the writing that was on the pages which you looked at in Mr. McGahan’s office?

A. I wouldn’t swear to that, because there are too many figures for me to remember so long a time back, but I do recognize that it has Mr. McGahan’s handwriting or printing.

(Deposition of David Zeidenfeld.)

Q. You don't know what was on the first page that Mr. McGahan showed you in November, 1940, do you?

A. I know that 1500 tons.

Q. That's the only item you have any recollection about that was on there?

A. That's about it. He did go through these a little [30] bit, so far as the pipe was concerned.

Mr. Paradise: When you say "this", Mr. Zeidenfeld, read the portion you are referring to, because it does not appear in the record as to what you are referring to when you merely say "this."

A. He showed me this main sheet.

Mr. Paradise: Which sheet do you refer to?

A. Page No. 1 of Exhibit 1, if you will call it that.

Mr. Paradise: In which the items—

A. —are listed as Boilers, Pumps, Pipe, Valves, Fittings, Engines, and Motors, and he has got these broken down to the different tonnages for each lot, and he has there 920 tons of pipe—roughly 900 tons.

Mr. Paradise: Do you recall that he showed you the portion that you are now reading?

A. I recall seeing that, roughly, and, you know, just certain figures, but I cannot exactly—for instance, you have here 8 tons of fittings, engines and motors. I wouldn't swear under oath I saw it, but I imagine it was all there, because of the fact that it is still page 1, and it doesn't look like anything has been tampered with on the

(Deposition of David Zeidenfeld.)

page. But I do remember specifically 1500 tons, and generally speaking, 900 tons of pipe, so I would assume 600 tons was material other than that.

Q. By Mr. Krasne: On page 2 of Defendant's Exhibit 1 for identification, did you read over any page in Mr. [31] McGahan's book that had similar subject matter, do you know?

A. I think the pages were just turned. So far as another page, or the next one was concerned, for instance, mention might have been made "We have this item" and the page was turned, and "We have this item" and the page was turned, and so forth. I couldn't swear under oath that I inspected those pages.

Q. In other words, if I understand you correctly, you looked at page 1 because it contained some total estimates that you remember?

A. That's right.

Q. With respect to the remaining pages, Mr. McGahan just thumbed through them while you were at his desk?

A. That is right.

Q. So you would not want to say under oath that these very pages that have been offered in evidence are exactly the pages that you saw on that occasion?

A. That's right.

Mr. Paradise: I object to Mr. Krasne prompting the witness by his leading and suggestive questions.

Mr. Krasne: I renew my objection. I will let the Court rule on it.

(Deposition of David Zeidenfeld.)

Q. By Mr. Paradise: Do you recall, Mr. Zeidenfeld, that all of these ten pages were thumbed over in your presence by Mr. McGahan, as you watched him, whether or not you recall the specific items which occur on each page? [32]

A. No, I don't remember that at all; I don't remember whether there were three pages or 15 pages.

Q. What is your best recollection?

A. My best recollection is that he just thumbed through at least three or four or five of them, that I can recall. There might have been ten, but it is so long ago—there might have been 15 for all I know, but I wouldn't want to swear under oath there were ten or less than ten.

Q. Is it your best recollection that pages 1 to 10, which I have shown to you, are the pages shown to you by Mr. McGahan on that occasion?

A. I wouldn't want to say they were all shown to me. I can only say, inasmuch as they referred to the same subject he might have thumbed through all of them, but I took no heed of how many pages were there.

Q. State which particular pages you do recognize.

Mr. Krasne: If he does recognize these as the pages.

A. As far as the pages are concerned, I wouldn't swear under oath that they are the same figures, but the page looks familiar to me, inasmuch as the figures on the page pertaining to the upper half only.

(Deposition of David Zeidenfeld.)

Q. By Mr. Paradise: What do you mean?

A. Pertaining to the specific tonnage, estimates of tonnages on boilers, pumps, and so forth.

Q. Do you recall seeing that?

A. I recall seeing it, but I don't remember the exact [33] tonnage that I saw. The main thing that struck me was 1500 tons total, of which 900 tons were pipe.

Q. What other pages do you recall having seen?

A. I recall seeing page 3, with the yellow markings on there.

Q. You don't recall at this time what specific figures were on the page that you examined at that time?

A. No, I don't recall any figures on that page. There was nothing definitely brought out to me. The pages were turned so fast: "Here we have something." After all, you are only interested in so many tons and then the page was turned.

Q. Do you recall anything on page 4?

A. So far as page 4, I wouldn't say that I recall it.

Q. Will you go through the balance of the pages, and state your recollection of the extent to which you examined the pages at that time?

A. Page No. 1 is the only one thus far where I examined with any closeness at all. The pages were kept turning until page 7, where he had a list of production and refinery pipe at Casmalia. I did not notice whether or not this pipe was anything else other than pipe just on the whole property, or whether or not it was just so many



(Deposition of David Zeidenfeld.)

tons of property on the lease. I do recall that Mr. McGahan gave me information about certain things, and I said "How many tons does the whole darn thing weigh?" [34]

Q. Do you recall the page?

A. It looks like one of the pages, but I don't recall the exact figures of footages.

Q. The balance of the pages—

A. If you will examine page No. 7 you will find that he has a heading of "Pipe" on the page.

Q. Do you recall any other pages, pages 8, 9 and 10?

A. Page No. 8, consisting of pumps, was shown me, where a few items were sold; a few items are to be retained by the company, but if I recall correctly, Mr. McGahan told me at that time, "After all, so far as the tonnage is concerned, that wouldn't make a lot of difference anyway, because they don't weigh a hell of a lot." Shall we change that to "a heck of a lot"?

Q. Do you recall the other pages? [35]

A. Pages 9 and 10 I don't recall anything about. I know there was some talk of tanks, but I don't recall anything about which tanks were to be retained, and which tanks were not to be retained, although I remember Mr. McGahan trying to give me that information. I told him I was not going to pay the money on the deal, and I would rather somebody else would look into that when they got up there.

(Deposition of David Zeidenfeld.)

Q. Is it your general recollection that these appear to be the pages which you saw in Mr. McGahan's office on that date?

A. Generally they look like the pages as I saw them.

Mr. Krasne: Is counsel referring to the two or three pages which the witness says he did see, or is he talking about all of these pages?

Mr. Paradise: I am referring to all 10 pages.

The Witness: I wouldn't want to guarantee that I saw all 10 pages, or whether they were thumbed through so fast, or whether I actually saw three or four of those pages.

Q. Is it your recollection that these were the pages that Mr. McGahan showed you on that date, regardless of how fast certain of the pages were thumbed through?

A. They appear to be the pages he showed me, but as to the number of pages I had seen I would not want to swear to that.

Q. You were particularly interested in the over-all tonnage, is that correct? [36]

A. That is exactly it.

Q. What was the over-all tonnage which Mr. McGahan stated?

A. Roughly, 1,500 tons of both steel and pipe.

Q. Did you ask him to break down that estimate?

A. That's about all I was interested in; how many tons of steel and how many tons of pipe were there.

(Deposition of David Zeidenfeld.)

Q. What does the item of steel consist of?

A. There was some mention made to me of boilers, loading platform and certain steel in the refinery proper.

Q. Was it your understanding that this total estimate of 1,500 tons, which you mentioned, referred solely to surface equipment?

A. This estimate of 1,500 tons, so far as I can recollect in my conversations with Mr. McGahan, was an estimate solely estimated as to the rough 1,500 tons, while there might be a little bit more or might be a little bit less; and so far as surface equipment on it, I presumed that the pipe was lying on top of the ground, or a few feet under the ground, where it had to be dug up to get it out.

Q. In what form? A. Horizontal.

Q. Do you mean pipe lines? A. Pipe lines. That was my idea of what it was, although I had no idea of what was up there, because I had never been up on the property. [37]

Q. Subsequent to that conversation did you make any report of that conversation to Mr. Morris Ferer?

A. Subsequent to that conversation I might have come into the office close to 5 o'clock, and at one time I think I saw Mr. Krasne in the office. Mr. Ferer was always so busy that I would drop in and out, and tell him "I have got some information for you you might be interested in," pertaining to certain deals of which this might have been one of them. He would say "See me tomorrow on it," and tomorrow he would be a little busy, when I would

(Deposition of David Zeidenfeld.)

give him certain figures on things; would give him an estimate of what was on the place, and the tonnage figures only.

Q. Subsequent to the conversation I just mentioned, which you had in Mr. McGahan's office, what conversation did you have with Mr. Ferer about this matter?

A. I think at one time I came into the office, and there was another salesman in the office at the time. It was not exactly a meeting amongst ourselves; I think it was after 5 o'clock, when I brought the matter up to Mr. Ferer. I don't know whether he himself felt—

Q. I am only asking you for the conversation, not as to what you think Mr. Ferer felt.

A. I don't want to guarantee exactly the day when I brought it up to him. I tried to see him a couple of days after that. There were so many deals of which this was just one, which I brought up to him. [38]

Q. Confine yourself to your discussion with Mr. Ferer, as to this particular deal. What was your conversation?

A. My conversation with Mr. Ferer—I would like to get something straight; I remember speaking to him, but whether I spoke to him first, or Mr. Clements spoke to him first, I don't recall.

Q. I am not asking about any conversation with Mr. Clements. I just asked you about your conversation with Mr. Ferer.

A. I think I spoke to him about so many tons of pipe up there and so many tons of steel.

(Deposition of David Zeidenfeld.)

Q. When you say "so many" did you mention the quantity?

A. I think I told him the estimate Richfield had was roughly 1,500 tons, of which 900 tons was pipe, and 600 was steel, which will have to be looked at pretty quick, because they will be asking for a bid on it in the near future—in a week or two weeks from now.

Q. What else was said in that conversation with Mr. Ferer about this transaction?

A. I don't think much more was said. I think I got out of the picture after that, because Mr. Clements was in.

Q. I am asking you about this particular conversation.

A. This particular conversation I don't think lasted over three or four minutes.

Q. You told him the tonnages Mr. McGahan had on it? [39]

A. That's right.

Q. How long after your conversation with Mr. McGahan did this conversation with Mr. Ferer take place?

A. I imagine the next three or four days.

Q. Would that be around the first week of December?

A. I imagine it would be the first or the second week, because this November 28th date, I don't recall whether that was the exact date I saw Mr. McGahan, or whether it was the first part of December I saw him.

Q. Do you know the date on which Aaron Ferer & Sons submitted a written bid to the Richfield Oil Corporation?

A. No, I don't.

(Deposition of David Zeidenfeld.)

Q. Did you know that a written bid was submitted by Aaron Ferer & Sons to the Richfield Oil Corporation?

A. I knew a bid was submitted after the bid was submitted. It might have been a week after the bid was submitted I heard about it, some time in January.

Q. You heard about it?

A. After all, when a company submits a bid, there is bound to be something get out that the company had entered into an agreement.

Q. Do you know whether this conversation which you had with Mr. Ferer was before or after the date on which Aaron Ferer & Sons submitted a written bid to Richfield?

A. I think it was before.

Q. Do you have any means of recalling whether it was [40] before or after? Is there anything which fixes that date in your mind?

A. It was some time in December, as I recall from hearing a few little things later. The bid was entered into either the latter part of December or the first part of January. This was in the early part of December.

Q. You fix it as being the first or second week in December as the time of your conversation with Mr. Ferer?     A. That's right.

Q. At the time of your conversation with Mr. Ferer was there any mention of the price to be bid by Mr. Ferer for this property?

A. Not at that time. I think the price entered into it a week or so after that; maybe two weeks after that.

(Deposition of David Zeidenfeld.)

Q. When you say "after that" do you mean after this particular conversation with Mr. Ferer, in which you told him of the total tonnage? A. That's right.

Q. Within a week or two after that conversation you had another conversation with Mr. Ferer?

A. I just came into the office where he and Mr. Clements were discussing certain things where I thought I might be able to help out on a deal.

Q. Was that conversation before Aaron Ferer & Sons had submitted the bid?

Mr.\* Krasne: If he knows. He testified he did not know [41] when the bid was made.

A. It was before the bid was entered into.

Q. By Mr. Paradise: Did you discuss price with Mr. Ferer at that time, the price which he should offer for this property?

A. The only thing I submitted to Mr. Ferer was "I think that it will take this much money to go into it." Whether or not Mr. Ferer took notice of that—

Q. I am merely asking about your conversation. When you mentioned the price which it would take, what was the amount that was mentioned?

A. I think somewhere around \$20,000.

Q. Can you repeat the full conversation about that amount?

A. As to what? I don't understand your question.

Q. I am asking you as to your conversation with Mr. Ferer, in which you mentioned the sum of \$20,000.

(Deposition of David Zeidenfeld.)

A. I just used to come into the office, regarding a deal, and I would generally tell him "If you are interested in it, it will take this much to buy it. Otherwise Richfield is going to sell it piecemeal."

Q. Is that the conversation in which you mentioned \$20,000?

A. I think it was somewhere around that.

Q. And in that conversation was there any mention by you of the estimated tonnage? [42]

A. No, I think by that time I was out of the picture entirely. I was not consulted about it.

Q. I am only asking whether or not you mentioned tonnage at the time you mentioned \$20,000.

A. No, I don't think I did any more.

Q. Did you have any other conversation with Mr. McGahan concerning this matter, other than the ones which you have mentioned, and which occurred prior to January 17, 1941?

A. I saw Mr. McGahan, according to the note book, on the 23rd of December. Whether it was pertaining to this deal or not, I don't recall.

Q. Where did that conversation take place?

A. It took place at Richville.

Q. What was the substance of that conversation?

A. I can't exactly say just what we were talking about at that date, but I still believed that on that date Richfield and Aaron Ferer & Sons were not completed yet with the deal that they had made on some scrap material they were hauling out of there.



(Deposition of David Zeidenfeld.)

Q. Are you talking about Casmalia, or another transaction?

A. I am talking about another transaction.

Q. Did you have any talk with Mr. McGahan on that date concerning this Casmalia transaction?

A. I don't think anything more was entered into about [43] figures.

Q. Did you have any discussion about this transaction with Mr. McGahan on that date?

A. I might have brought up with him when the bids were to be opened, when the bids were to be closed, or something of that nature, but other than that I don't think much more was discussed about it.

Q. Calling your attention again, Mr. Zeidenfeld, to page No. 7 of Plaintiff's Exhibit No. 1, did you and Mr. McGahan discuss at that conversation, which I understood you to state occurred within a few days subsequent to November 28th—did you discuss the footage of the pipe lines that are shown on that page?

A. Mr. McGahan may have mentioned it, but I did not take any heed as to footages.

Q. At any of the times which you have mentioned, including your conversations with Mr. McGahan and your conversations with Mr. Ferer, did you have any knowledge that there were any oil wells on the property?

A. I don't even think they were ever mentioned between Mr. McGahan and myself. I did not know anything about the property, whether there were oil wells on the property, or away from the property.

(Deposition of David Zeidenfeld.)

Q. Was it your understanding, during all of these conversations, that the items of equipment which you were discussing with Mr. McGahan, and which you afterwards discussed [44] with Mr. Ferer, at the conversations you have mentioned, were surface equipment?

A. To answer that question correctly, what do you mean by surface equipment? Are you referring to pipe lying on top of the ground, uncovered, or are you referring to pipe which might be two or three feet under?

Q. When you say two or three feet under, do you mean pipe lines?

A. If that is what you mean by surface equipment?

Q. Yes.

A. That was what I thought it was; that the pipe lines were equipment of that nature.

Q. Was it your understanding that the items you were discussing included refinery equipment, such as boilers, tanks and pumps, and also included pipe lines, and did not include anything else?

A. That might have been my assumption.

Q. Was that your understanding?

A. There was no definite understanding between Mr. McGahan and—

Q. I am talking about your understanding.

Mr. Krasne: Let him finish his answer.

A. So far as my understanding is concerned, I really thought in my own mind, that it was line pipe, boilers, refinery, and that type of equipment; and that oil wells didn't even exist on the property. [45]

(Deposition of David Zeidenfeld.)

Q. By Mr. Paradise: When you speak of line pipe you are referring to pipe lines, are you not?

A. When I figured on pipe, I figured it was pipe lines.

Mr. Paradise: Is it satisfactory, Mr. Krasne, to substitute photostatic copies of these sheets in lieu of the originals?

Mr. Krasne: Yes.

Mr. Paradise: That is all.

#### Cross-Examination

Q. By Mr. Krasne: Mr. Zeidenfeld, counsel has used the words "surface equipment" in some of his questions to you. Isn't it a fact that the question of whether any of the material was on top of the ground or under the ground never actually entered into your mind until in recent discussions you learned there was a controversy between Richfield and Aaron Ferer & Sons?

A. I just referred to that as so many tons of that and so many tons of this. Mr. McGahan, so far as he was concerned, mentioned certain things I was not interested in, inasmuch as I was looking for specific tonnage. So far as the surface equipment itself, he may have used it, but I don't recall it exactly though, because I was judging it in so many tons of pipe.

Q. Because the use of that word by counsel is rather [46] a point in this controversy I want you to be sure, in giving your answer, you are talking about what you thought at the time Mr. McGahan gave you whatever information he gave you and not to what you are

(Deposition of David Zeidenfeld.)

thinking now in the light of the lawsuit between Richfield and Aaron Ferer. Do you understand what I mean? Do I make myself clear?

A. I understand what you mean.

Q. So then, isn't it a fact that at all of the times that you ever discussed this matter with Mr. McGahan you didn't give any thought to whether the material was on the surface or under the ground; what you wanted to know was how many tons of material there was up there, isn't that right?

A. Primarily that was what I was interested in.

Q. Prior to your discussions with Mr. McGahan you had never been up to the Casmalia property, had you?

A. Not prior to it, nor after it.

Q. So that actually your earlier discussions with Mr. McGahan were to the effect that they had some property on which there would be some material for sale, is that right?

A. That's right.

Q. You don't know how much of the property was devoted to the oil field, or how much of the property was devoted to refinery activities when you first began discussion of this with Mr. McGahan, did you?

A. I had no idea as to the use of the property at [47] that time. I knew there was a lot of material on the property to be sold.

Q. That's right. And from the nature of the work that you were doing, looking for purchases of material, it would not make any material difference whether you were looking for pipe that was in one form or another, would it?

(Deposition of David Zeidenfeld.)

A. I was primarily interested in pipe, or anything that has metallic value.

Q. In other words, when you were discussing, in a preliminary way, this possible deal that might be coming up, if some pipe was taken from the property for that purpose, it wouldn't make any difference whether the pipe would come from horizontal lines or vertical lines, would it?

A. It would not make any difference at all, because the firm was interested in anything that they could turn to make some money out of.

Q. Isn't it a fact that when Mr. McGahan told you that he thought there was approximately 900 tons of pipe on the property, you did not stop to consider in what exact form on the property that pipe was, did you?

A. I did not consider it. I am assuming that the pipe was in pipe lines.

Q. When you say you are assuming it, was anything said that led you to that assumption?

A. It led me to that assumption because I had never figured on any pipe in wells, and I will say also any pipe [48] vertically in the ground, previous to that time.

Q. You mean your particular experience had been such that you had not dealt in any vertical pipe in the ground? A. That's right.

Q. In the first discussion that you had with Mr. McGahan, which I believe you said was some time in September, Mr. McGahan simply told you, I believe, that he thought he would have a deal for you, but they were not ready to talk about it?

(Deposition of David Zeidenfeld.)

A. He told me, if I remember correctly, that there was a deal coming up, which will involve quite a bit of pipe and other materials. I think that was the way it was brought up.

Q. What the form of the pipe was, or was to be, was not discussed?

A. No, it was purely on the assumption of what it might be. There was nothing definite, so far as I am concerned, which was said at that time.

Q. When you had this conversation in which Mr. McGahan told you what he estimated the tonnage to be, did he tell you that the company wanted to sell you 900 tons of pipe? Is that the quantity that he said he wanted to sell?

A. No, I think he just used those figures for the benefit of the buyers, to give them an idea; that there might be that or a little less or a little more. It was purely an estimate of the tonnage. There was no exact tonnage.

Q. Did he say anything about what form the company [49] would be interested in accepting bids?

A. I don't understand your question.

Q. In other words, did he tell you if Aaron Ferer & Sons were interested in the material on the Casmalia property that they should go and look at it and make him an offer? Is that what he told you?

A. That's right.

Q. Did he tell you that Richfield wanted to sell everything on the property up at Casmalia, with the exception of certain items that they were to hold back?

(Deposition of David Zeidenfeld.)

A. If I remember right, he gave me the route to take up there, and told me to go up there and find Mr. Duncan up there, and he will show you around, and you figure all the stuff on the property, and we were to bid on that, and we will have a man to show you around.

Mr. Paradise: I would like to know which conversation the witness is referring to.

A. That was one of the conversations or later conversations. I told him I had not been up there. I think it was some time in December when he gave me that route to go up and see the material, because I understand there were quite a few other bidders going up there at the time, and they wanted to get them up there at a time when either Mr. McGahan was there or somebody that knew something about it.

Mr. Paradise: Are you referring to the conversation at the time Mr. McGahan showed you the document, or at a time [50] prior to that?

A. No, it was at the time of the documents, or maybe a little after that.

Q. By Mr. Krasne: In other words, what you understood from Mr. McGahan was that they had a deal up at Casmalia, in which they wanted to sell all the material on the property?

Mr. Paradise: I object to this upon the ground that it states facts not in evidence. The witness did not testify to that.

Mr. Krasne: This is cross-examination. Let us find out what he understood the conversation to mean.

(Deposition of David Zeidenfeld.)

Mr. Paradise: Let us ask him. Read the question Mr. Reporter.

(Question read by the reporter.)

Q. By Mr. Krasne: —and that Aaron Ferer & Sons should go up and look at it and see for themselves what there was there, and take their own chance as to the quantity, and make a bid to Richfield, is that correct?

Mr. Paradise: I object upon the same ground.

Mr. Krasne: Answer the question, please.

A. Is it all right to answer the question?

Q. Yes.

A. I want to treat everybody right.

Q. Let me explain to you, so that you will understand the nature of this procedure, that when a question has been [51] asked you, the mere fact that opposing counsel makes an objection does not mean that you are not to answer the question. You are still to answer the question. Counsel's objection has been noted in the record, and if necessary will be passed upon by the court.

The Witness: Can you read the last question, please?

(Question read by the reporter.)

A. That is correct, with the understanding that there would be somebody up there to show us around where this material was located.

Q. By Mr. Krasne: Isn't it a fact that Mr. McGahan told you that he did not want you to hold him as to these estimates as to quantities; that actually it was a field



(Deposition of David Zeidenfeld.)

that he did not have complete records on, and that that was merely his estimate as to what you would find on the property?

A. I believe in all justice to Mr. McGahan that was a theoretical estimate of what he thought was there; that there might be a little bit more—lots more or less, but he felt that that figure in his mind was what there was there, but it was up to the buyer to determine for themselves as to what they thought was there. That was just a guiding figure of what he thought, that he furnished the buyer.

Q. You had had previous dealings with Mr. McGahan's department in the Richfield corporation, hadn't you? A. Yes, sir. [52]

Q. And in connection with other deals where you were interested in buying salvage material, did the records that Mr. McGahan had give more or less detailed information than the information which he was able to give you on this deal? [53]

A. Well, the other deals that I had bid on with the Richfield were all deals that we bid on a tonnage basis or were in lots small enough so there wouldn't have been a margin one way or the other; you couldn't lose too much money on it, or if you lost it all, you couldn't lose very much. If I remember, the way Richfield bids are made up for their own departments, they make up a list of a certain lot number, with so many items. This is outside of the scrap iron in general, where they might have a couple of pumps and other items.

(Deposition of David Zeidenfeld.)

Mr. Paradise: Just a minute. Are you speaking of some specific documents you have seen?

A. I am talking about bid forms put out by Richfield.

Mr. Paradise: Are you talking about documents?

A. I am not talking about any big deal; just little bids put by the company.

Mr. Paradise: Are you referring to letters, communications or documents?

A. I am talking about letters they sent to us, to all bidders, asking for bids on equipment.

Mr. Paradise: I object to any testimony concerning any such documents, as not the best evidence.

Mr. Krasne: I will put the question a little differently.

Q. When you had occasion to discuss deals with Mr. McGahan with respect to the purchase of other materials, Mr. McGahan has been able to give you detailed information [54] concerning the quantity they desired to sell, isn't that right?

Mr. Paradise: I object to that as leading and suggestive, and entirely incompetent, irrelevant and immaterial to the issues in this case, as to what they did in other deals.

Mr. Krasne: Answer the question.

A. Mr. McGahan did not have to, because it was usually listed on a sheet of so many pieces of this item that they wanted to sell, that they could either bid on as junk, or bid on the full lot.

(Deposition of David Zeidenfeld.)

Mr. Paradise: I move to strike the witness' answer upon the ground that he is testifying to a written document that is not before us; we don't have it here, and it is the best evidence.

Q. By Mr. Krasne: Did the information Mr. McGahan gave you in connection with this Casmalia deal differ from the type of information that he ordinarily gave you in connection with other deals?

Mr. Paradise: Are you asking for a comparison between this and other written documents, Mr. Krasne?

Mr. Krasne: I am asking him as to the information that was given to him.

Mr. Paradise: Same objection. This inquiry is directed to the contents of written documents.

A. Well, other than hearing information that we got was simply to bid on certain lots of material which they [55] might want to get off their inventory by listing them that way, and charging the money back against the inventory, which they received from that type of material. I imagine they had to list them that way; whereas in this bid here, the items that were readily seen I imagine were on that list, but the items that were not visible, such as pipe, I imagine he tried his best to get what they were, and list them. There was a lot of that stuff that was in the field, I understand, prior to Richfield taking over the field.

Q. By Mr. Krasne: Isn't it a fact that Mr. McGahan told you that in this deal he did not have the same type of information that he ordinarily had, because this was an old field and the material that was up there for sale

(Deposition of David Zeidenfeld.)

was material that had been put in the field long before he had anything to do with it?

A. I don't remember any reference to whether he told me anything about that but—

Mr. Paradise: That is all the question was.

Mr. Krasne: Finish it.

A. But so far as this bid was concerned, this was a bid that was to be a bid on the whole works, whereas with other bids you might have 30 or 40 different lots where you are to bid on each individual lot.

Q. What did Mr. McGahan tell you about going up to look at the property and seeing for yourself what there was there, if he did tell you anything to that effect? [56]

A. All that I remember Mr. McGahan telling me was to go up to the property, and that someone or Mr. Duncan would be there to show us around as to just what they wanted to go, or what things they wanted to sell might be, and for you to determine in your own mind what you were going to give, figure it out, and turn your bid in to the office.

Q. He did tell you, didn't he, that these estimates which he told you he had were based upon pretty scant information, and he did not want to be held to them?

Mr. Paradise: I object to that as putting words in the witness' mouth.

Mr. Krasne: This is cross-examination. I think I have a right to.

(Deposition of David Zeidenfeld.)

A. Mr. McGahan did not tell me that in so many words. He said this estimate he was showing me is simply something to guide me as to what he thinks is there, and for me to go up and use my own judgment from there, and if there was any more there I could bid a little bit more, and if I didn't think there was very much. I could bid a little bit less.

Q. Isn't it a fact that you didn't actually formulate any opinions as to the nature of the pipe that would be on the property, at the time you had your discussions with Mr. McGahan, but were rather waiting until the property would be looked at to see what kind of pipe was on the property?

A. I in my own mind thought they were pipe lines, [57] but, like I say, formulating a definite opinion, I didn't, because I had not been up there on the property, and I thought that when I would go up to the property, I really assumed that there were pipe lines, when I got there or we got there, but inasmuch as I had never been over there I just at that time was assuming.

Q. In other words, that was a matter that would be deferred until you would actually go up and see what kind of pipe was on the property, isn't that right?

A. Any deal of that nature that involved that amount of money requires inspection. A man if he were to spend any money, he would want to see what he was going to buy, whether it was in line, or anywhere else. I don't want to say I did not know they were in line, because I did not. I just assumed they were line pipe.

(Deposition of David Zeidenfeld.)

Q. These discussions with Mr. McGahan were, in your mind, very preliminary discussions, were they not?

A. Everybody has these discussions prior to any deal they are going into of this magnitude.

Q. If you had known that there were old oil wells on the property at the time you had this discussion with Mr. McGahan, and if you had known that there was pipe in those wells, your surmise that the pipe that was on the property was only horizontal pipe might have been entirely different, isn't that right?

Mr. Paradise: I object to that as being entirely [58] hypothetical, inasmuch as the witness has testified he did not know anything about the existence of any oil wells on the property, and had assumed that all of the pipe that Mr. McGahan was talking about was pipe lines, as he testified.

Mr. Krasne: I will withdraw the question and ask you this, Mr. Zeidenfeld: In these preliminary discussions that you had with Mr. McGahan, in which he told you that he thought that there was about 1500 tons of material up there, you did not actually have the faintest idea of just where that was on that property, isn't that correct?

A. I didn't picture anything too much, excepting that here is a piece of property with a loading rack; you drive in, you have to cross the river to get to the refinery way on the other side, and the pipe lines are somewhere way in there. I am assuming they were pipe lines, because I had in mind at that time, I knew there were a

(Deposition of David Zeidenfeld.)

lot of hills and dales to crawl over, and what was in these hills I did not know, or anything, because I knew it was a pretty big plot of land.

Q. All you knew was, here was a company which thought they had about 1500 tons of material up there, and that was a sufficient quantity to justify you in going up there and looking at the property, and seeing what was there, isn't that right?

A. That is true of any person that is bidding on material. [59]

Q. You told Mr. Ferer, I believe you said, after this conversation, that there was the Richfield deal coming up; that was probably the first thing you told him, isn't that right?

A. That is right.

Q. You did not go into any details?

A. I told him, if I remember correctly,—it is a little vague in my memory right now—that there was a good sized deal coming up at Richfield, and I don't know what Mr. Ferer answered me, whether he just threw it off and mentioned something else; I don't know as to that.

Q. You did not go out to see this property with Mr. Ferer, did you?

A. No, I didn't.

Q. You have never been on the property, is that right?

A. No.

Q. Did you tell Mr. Ferer that if he were interested in this deal, you would go up and look at it, and see what was on the location, and tell him, and make a bid?

(Deposition of David Zeidenfeld.)

A. I think I did, but I think somebody else entered into the picture at that time; and either that somebody else had gone up there, and looked at it already, and had probably spoken to him about it.

Q. In other words, isn't it a fact, Mr. Zeidenfeld, that after casually mentioning this possible deal with Mr. Ferer, that thereafter he carried on in his looking, and his [60] negotiations, and the purchase, in connection with his deal, without you? A. That's right.

Mr. Paradise: I object to the question, and move to strike the answer upon the ground that no proper foundation has been laid.

Q. By Mr. Krasne: And you did not know in advance of Mr. Ferer going up on the property that he was in fact even going, isn't that a fact?

A. No, I heard the day after he got back that he had been up there.

Q. You don't know what material on the property Mr. Ferer looked at, do you?

A. I don't recall anything being mentioned to me about it after he had once gone up, with one exception, where he might have asked me again at that time what it would take to get it; what it would take to buy it.

Q. After Mr. Ferer had come back from the property he had no discussions with you with respect to what he had looked at up there, isn't that right?

A. That's right.

Q. Mr. McGahan, in his conversations with you, when he referred to what he thought would be about 900 tons of pipe, used the word "pipe", didn't he?



(Deposition of David Zeidenfeld.)

A. In my mind, he used the word "pipe." He might have sometimes used the words "line pipe" in speaking.  
[61]

Q. But he referred to it all as pipe, didn't he?

A. He referred to it all as pipe, but sometimes he might have mentioned the words "line pipe" too. Whether that would constitute the whole was line pipe, or whether I, in my own mind, had it already figured out as line pipe, that is something else. I had no formulated idea exactly what it was, but I just figured that is what it was, pipe in line.

Q. I notice on the first page of Defendant's Exhibit No. 1 for identification, and which has been offered in evidence as Defendant's Exhibit No. 1, the notation, "Pipe—920 Tons." Is that right?      A. That's right.

Q. Isn't it a fact that when you saw that, you thought in terms of tonnage, 900 tons of pipe, you were thinking in terms of pipe as it was received to be for resale by someone interested in the salvage business, isn't that right?

A. That is how I figured the pipe; so many tons of pipe, which could be resold at so much money, and so many tons of steel.

Q. Right. So when you were thinking in the terms of Mr. McGahan's estimate of 920 tons, approximately that amount, in your mind at that time it did not make a particle of difference whether that was pipe from a vertical line or from a horizontal line, or that happened to be lying loose on top of the property, is that right?

(Deposition of David Zeidenfeld.)

A. That's right; it did not make any difference. But [62] can I add something to that?

Q. Yes.

A. The pipe itself, so far as tonnage is concerned, it did not make any difference to me whether it was horizontal or vertical; the only thing I can say, I had no formulated idea that this was pipe in line, or anything else, but just an arbitrary vision I had in mind that it was horizontal pipe. I had no other idea of pipe at the time, because I hadn't seen anything on the property.

Q. In other words, in this very preliminary discussion in which you were learning for the first time that Richfield had approximately 900 tons of pipe, you got a visual picture of what you guessed would be the nature of the property from which this pipe would be removed, is that right?

A. That is exactly right.

Q. You don't mean to convey the impression by the answer which you have given to Mr. Paradise's question, do you, that you were considering this deal from the point that Aaron Ferer & Sons were only to buy horizontal pipe?

A. As far as what I answered before, Aaron Ferer was interested in buying anything of value, of metallic value, that they could resell for a profit, be it horizontal or vertical, but in this case I had no formulated idea. I am just repeating myself time and again.

Q. I want to get what was in your mind absolutely clear; that is why I have asked you this question. I want [63] to get your last and final answer, that so far as your thoughts were concerned, all you gathered from

(Deposition of David Zeidenfeld.)

Mr. McGahan's discussion was that he thought there was approximately 900 tons of pipe, and that you looked at that potential purchase of 900 tons of pipe, irrespective of where it came from, isn't that right?

A. That is right.

Q. When Mr. McGahan told you that if Aaron Ferer & Sons were interested in making the bid, they should go up to the property and see for themselves whatever there was on the property, and make a bid, he told you there were a few things on the property that Richfield did not want to sell, isn't that correct?

A. That's right.

Q. You understood from what Mr. McGahan told you, however, that, except for the items that they did not want to sell, they were interested in obtaining a bid for everything else that there was on the property, isn't that right?

A. That was my assumption.

Q. And when Mr. McGahan was telling you about the items that were to be excluded, or held back, did he tell you that Richfield did not want to sell the pipe that was in the oil wells on the property?

A. I don't ever recall hearing anything about oil wells on the property. It did not even enter my mind about wells being around there, although I figured if there were [64] any they were on somebody else's property, or some place where the oil might have come from.

Q. I would like to see if you can answer my question yes or no. I will reframe it: When Mr. McGahan told you that they would be interested in getting

(Deposition of David Zeidenfeld.)

a bid for everything on the property, with the exception of the items that they wanted to hold back, he did tell you what items they had to hold back, or wanted to hold back, did he not?

A. He gave me an idea of what they were, and when I came to the office I think they already knew about that.

Q. Did he or did he not say to you in substance and effect, "We desire to retain, and do not want to sell, the pipe that is in the oil wells"?

A. I don't recall anything mentioned of pipe in the oil wells up there.

Q. So that he did not tell you that they wanted to hold back or retain the pipe in the oil wells, did he?

A. If he did, I don't recollect that he did.

Q. As a matter of fact, you are sure that he did not say that, aren't you?

A. I am quite sure. As a matter of fact, I can just about say definitely that I don't remember anything like that taking place.

Q. Did Mr. McGahan tell you that Richfield did not want to sell any producing or refining equipment that was not on top of the land? [65]

A. I don't even think that we discussed anything about on top or under at all. There was just so much equipment on the property.

Q. That's right. Mr. McGahan then never said to you, in substance or effect, that one of the items they wanted to retain was any pipe that might be below the surface of the land; he never said anything like that to you, did he?

(Deposition of David Zeidenfeld.)

A. I don't think there was any mention made in my conversation with him concerning the oil wells on the property.

Q. I am asking you about any pipe; he did not tell you there was any pipe that was not on top of the surface of the land that was not to be included in the deal, did he?

A. I don't recall exactly whether there were a few lines Richfield wanted to keep, or whether "that line did go, or this line don't go." I don't think any mention was made of any pipe in the oil wells because I don't think it entered my mind that there were oil wells on the property.

Q. Please, Mr. Zeidenfeld, listen to this question so that you can answer it: In your discussions with Mr. McGahan did he say to you that Richfield did not want to sell any pipe, or any production equipment that was not on top of the surface of the land? Did he tell you that?

A. Can I ask you a question pertaining to your question, whether this is the same substance of your question: Are you trying to ask me whether Mr. McGahan asked me, or told [66] me that no pipe in the oil wells goes?

Q. That you have already answered; you answered that he did not tell you that, that is correct?

A. He did not tell me anything about it. It was not even brought up in the discussion.

(Deposition of David Zeidenfeld.)

Q. There wasn't any mention at all?

A. That is right.

Q. Therefore you can say with certainty, can you not, that Mr. McGahan did not tell you that Richfield wanted to hold back the pipe in the wells?

Mr. Paradise: I think the entire line of questions is entirely argumentative. He has already testified there was no discussion of the wells.

Q. By Mr. Krasne: It is likewise true, is it not, that Mr. McGahan, in his discussions with you, the things he said, never made any distinction between any of the equipment that had been on top of the surface, or any of the equipment that might have been below the surface; he never discussed it at all, isn't that right?

A. There were no discussions, that I recall, anything about that. If you are referring to anything that was in the ground or on top of the ground, we just referred to so many tons of material there.

Q. That's right. And the reference was to Mr. McGahan's estimate of so many tons of material, without either of you having said a single word about where that [67] equipment was to come from, isn't that right?

A. The material on the property; they wanted to sell all material on the property, from what I understood, with some exceptions. I was never up to the property, so I wouldn't know what it was all about. I was supposed to go up there to see it, but I never did go up.

Mr. Krasne: That is all.

(Deposition of David Zeidenfeld.)

Redirect Examination

By Mr. Paradise:

Q. In one of Mr. Krasne's questions to you, Mr. Zeidenfeld, I think he framed his question by asking if it was not true that you did not have the faintest idea of what the items were that you were discussing with Mr. McGahan. What period of time in these negotiations were you referring to? First, may I ask if you recall that question of Mr. Krasne's?

A. With reference to whether I just formulated in my mind so many tons of material on the property, in one form or another,—is that what you are bringing out?

Q. No, Mr. Zeidenfeld, his question to you said: Isn't it true that you did not have the faintest idea of what the items were that you were discussing; that is to say, the items on the property. I am trying to fix the time to which your answer to that question referred. Is it not true that the time you were referring to was the [68] time of your first conversation with Mr. McGahan, in September of 1940?

A. That's right. All I knew at that time, there was a lot of material for sale.

Q. Did you obtain any more specific idea of what the items were of equipment to be sold, at your subsequent conversations with Mr. McGahan, during the first week of September?

A. I, in my own mind, got the idea that there was a lot of pipe; there were tanks, boilers, and so forth, which were to be sold up there.

(Deposition of David Zeidenfeld.)

Q. When was it that Mr. McGahan suggested to you that you go up there and visit the property, in which of the conversations you referred to?

A. I think it was in the conversation around the first part of December, or the latter part of November.

Q. Was that after Mr. McGahan had showed you these documents, these sheets, that is that are marked Exhibit No. 1, or was it before that time?

A. Just about that time. It was all within a period of two days one way or the other. He asked me, I know, on different occasions while I was around there, even while we were walking around, looking at other materials, on bids, "Have you gone up to see it yet" and this and that. I told him, "Not yet, but one of these days." So, so far as the dates being exact, I can't give those to you at this time, [69] because I don't have any record of it.

Q. At the time Mr. McGahan showed you these documents, about the first week of December, did he state he had any more specific idea of what items were on the property than he had at the time of the first conversation with you?

A. Yes, he did. He said he had been compiling these estimates every trip he made to the property, every week or two, or whenever he gets up there, and just added them to that original estimate that he had, and from that made this so-called estimate that he has in this Exhibit No. 1.

Q. Did Mr. McGahan tell you whether or not he would accompany you on any inspection trip that you would want to make of the property?



(Deposition of David Zeidenfeld.)

A. He told me once or twice, maybe even three times, that he was going to be up at the property next Monday or Tuesday, or whatever part of the week it happened to be, and "if you can come up during the day, I will be pleased to show you around." I told him "I think I am going to be up" once, and I failed to show up, because at that time there was an agreement already entered into by Mr. Ferer and the other party concerning that, and I was more or less out looking for something else.

Q. Did Mr. McGahan ever tell you, in any conversation between yourself and him, that everything that Richfield had on the property would be sold with the exception of certain items which he described? [70]

A. The way he put it to me, "all this material I am showing you, or telling you about the tonnage, you know, this 1500 tons, is on this property, but we want to retain"—I don't recall whether it was one or two or three pipe lines on the property, and he gave me a list of some tanks he wanted to keep, and there was a list of some items that were to be held, and as far as the oil wells, we never did go into the conversation at all as to anything pertaining to wells on the property.

Q. Did you have an idea, from your discussion with Mr. McGahan at that time he showed you the documents, as to what types of equipment would be sold? Did you discuss the types?

A. The only thing I remember discussing with Mr. McGahan, outside of there was a little pipe—he said once in a while "Here is some 8 inch line, or 6 inch line," and I told him it did not make any difference to me whether

(Deposition of David Zeidenfeld.)

it was 6 or 8 or 4 or any size. I think we dwelt a long time on a few little pumps he had on the list: These are pretty good pumps, I remember his telling me, and that the company wants to reserve one of the few he had marked off in the book, or: By the way, we just sold this pump to somebody else, they wanted it for their use.

Q. Isn't it correct that the estimate of material that Mr. McGahan showed to you, and explained to you, broke down his estimate of the aggregate tonnage of 1500 [71] tons to between approximately 900 tons of pipe lines, and the balance approximately 600 tons of other steel?

A. That's the way he had it compiled in his estimate, as to what he felt was there.

Q. And what did you say were the items that composed other steel, other than pipe lines?

A. So far as pipe line was concerned—

Q. I am talking of the other items other than pipe line.

A. The other items of steel consisted of—there was a loading rack, some boilers, also pumps, and refinery equipment mainly, I imagine, that is what most of the steel was, in the refinery division.

Q. In your own mind were you considering anything other than pipe lines and the other items of steel which you mentioned?

Mr. Krasne: I object to the question upon the ground it assumes facts not in evidence. Counsel is putting words into the witness' mouth, and keeps referring to 900 tons of pipe line. The witness' testimony has been

(Deposition of David Zeidenfeld.)

that the estimate was that there were 900 tons of pipe. The exhibit which counsel has offered in evidence refers to 900 tons of pipe. Whether counsel desires to confuse the witness, or the record, by constantly referring to 900 tons of pipe line, I think the record should be clear that there were 900 tons of pipe. [72]

Mr. Paradise: There is certainly no desire to confuse either the witness or the record. I think Mr. Krasne's statements are entirely unwarranted. Just answer the question. A. In my own mind—

Q. Do you recall the question?

A. You are asking the question, whether or not the 900 tons were referred to as pipe in line—that's it roughly?

Q. That is not the specific question, but you can answer the one you just mentioned.

A. Can I have the last question read?

(Question read by the reporter.)

A. In my own mind the pipe was in line, and I had no idea that there was any other pipe on the field outside of pipe in line, because of not having been on the property.

Q. When Mr. McGahan stated to you that his over-all estimate was approximately 1500 tons, did he say that was exact or approximate? A. Approximately.

Q. Did he tell you that the property was quite old, and that some of the lines might have been taken up since the original records were prepared?

(Deposition of David Zeidenfeld.)

A. He told me, so far as I recall, that he had records that he compiled from what was on the property when Richfield took over, and he tried to deduct for those which had been [73] taken out, but he don't know whether there is any more on the property, or whether any left the property. It was purely an estimate of what he in his own mind thought was there.

Q. Did he say he thought other lines had been added?

A. I don't recall whether or not that question was asked by Mr. McGahan—I mean, whether or not he gave me an answer of that sort.

Q. Did Mr. McGahan state that some of the pipe lines might have been taken up, and that his estimate of approximately 900 tons was too high?

A. I don't recall that he said that the estimate was too high. I do recall that he told me that there was some pipe sold; somebody took some lines up, quite a few years back, and whether or not anything was added to that prior to their taking up, that might have been more than in the estimate, or not, I don't recall his telling me anything like that.

Q. I believe, in answer to Mr. Krasne's question, you stated that you contemplated making a trip to the property, and that you would not know exactly what was up there until after you had seen the property, is that correct?

A. Like I said before, I never bid on anything unless I look at it, of such a magnitude of material, inasmuch as I always try to get an estimate of what might be at a place. It helps me in determining what might be up there, [74] to either add to or deduct therefrom.

(Deposition of David Zeidenfeld.)

Q. I believe, in answer to another of Mr. Krasne's questions, you stated that it would not have made any difference to you if the pipe had been horizontal in the form of pipe lines, or had been placed vertically in the ground, is that correct?

A. So far as the tonnage was concerned, it would not make any difference, because it is all pipe, if it has weight.

Q. At that time, however, you did not know there were any oil wells upon the property, is that correct?

A. That's right.

Q. When you speak of pipe being placed vertically in the ground, are you talking about casing cemented in the oil well? Is that what your answer referred to when you talked about property placed vertically in this ground?

A. Referring to this deal?

Q. That is what you are now referring to?

A. Yes.

Q. Might there have been a discussion like that with Mr. McGahan?

A. Mr. McGahan did not mention anything like that to me.

Q. In all of the transactions which you had negotiated for the purchase of pipe line on behalf of Aaron Ferer & Sons, had you ever attempted to negotiate the purchase of any casing that was installed in the oil wells? [75]

Mr. Krasne: Just a minute. I object to it on the ground that it assumes facts not in evidence. I don't know of any evidence that this witness has ever purchased any casing that was installed in oil wells.

(Deposition of David Zeidenfeld.)

Q. By Mr. Paradise: Have you ever negotiated for the purchase of pipe lines?

A. No, this is the first deal Aaron Ferer ever entered into, since I worked with Aaron Ferer, that he attempted to take over a deal with pipe lines to be taken up.

Q. In any of your operations, whether for Aaron Ferer or not, and I am speaking now as to the period prior to the negotiations that you conducted with Mr. McGahan, had you ever attempted to purchase old pipe lines for salvage?

Mr. Krasne: I object to that upon the ground it is incompetent, irrelevant and immaterial.

A. I have had only one experience in taking up pipe lines, and they were all lines, pipe lines in general; that was at the Sunset Oil Company's refinery, at Vernon and Santa Fe Avenues,—the old refinery of the Sunset Oil Company, where we bought pipe in ground, but there wasn't anywhere near the magnitude of material in that place. We bought sight unseen, for so much money, but it did not involve too much.

Q. By Mr. Paradise: Was that a transaction negotiated on behalf of Aaron Ferer & Sons?

A. It was a transaction with the El Paso Pipe & [76] Machinery Company.

Q. Did that occur prior to the negotiations you had with Mr. McGahan?           A. Yes.

Q. Do you know whether the cost of removal of pipe lines from a property is less or more than the removal of casing from any wells on the property?

(Deposition of David Zeidenfeld.)

Mr. Krasne: I object to the question upon the ground that it is incompetent, irrelevant and immaterial. For the purpose of considering my objection, I should like to state that all of the testimony of this witness would show that his contact with the deal involved in the present litigation was all preliminary, and preceded any of the actual negotiations that were carried on for the purchase of the equipment covered by the contract that is involved in this litigation; that nothing that he has testified to would make the question of whether or not he at that time concerned himself with the cost of removing material; it would be immaterial. [77]

Mr. Paradise: Will you answer the question?

A. I have never had any experience handling anything or taking up casing from oil wells. I would not know the approximate differential of cost between taking up casing from an old oil well and taking up pipe lines in the field.

Q. By Mr. Paradise: Did you, at the time of your negotiations with Mr. McGahan, know anything about the manner of abandonment of oil wells?

Mr. Krasne: I object to that upon the ground that it is incompetent, irrelevant and immaterial. The witness has testified that oil wells were never discussed between him and Mr. McGahan.

Mr. Paradise: I believe this line of examination is entirely relevant and proper, inasmuch as on cross-examination Mr. Krasne asked the witness—I think Mr. Krasne's question was whether or not it was not true that it made no difference whether the pipe was horizontal in pipe lines, or was placed vertically in the ground.

(Deposition of David Zeidenfeld.)

Mr. Krasne: That question was in reference to the estimate that there were approximately 900 tons of pipe.

Q. By Mr. Paradise: You testified, I believe, Mr. Zeidenfeld, that at the time you were discussing this matter with Mr. McGahan you had no knowledge of the fact that there were any oil wells on the property?

A. That is true.

Q. Had you known at that time that there were any oil [78] wells upon the property, and had also known that the cost of the abandonment of wells, which was necessary in order to remove casing from any of the wells, was a very considerable factor, would it have made any difference to you whether the pipe was in the form of pipe lines or was casing installed in the well?

Mr. Krasne: Just a moment before answering. I object upon the ground that the question is incompetent, irrelevant and immaterial, so far as this witness is concerned. The record shows quite clearly that he never entered into any of the actual negotiations for the deal involved in this litigation; the record shows that all he did was to ascertain, in September, that Richfield was going to have some material for sale, and that in the latter part of November he learned that in Mr. McGahan's opinion there was a total of approximately 1,500 tons of material on the job, that was coming up for sale; that after that all of the negotiations were carried on by persons other than himself.

Mr. Paradise: Will you answer the question?

A. Read the question again, please.

(Question read by the reporter.)



(Deposition of David Zeidenfeld.)

A. The only difference that it would have made would have been that I would have gotten somebody there to give me an idea as to the cost, or I would have asked somebody who was in that line to tell me approximately how much money it takes to handle a job in the nature of taking up casing, and [79] either added or deducted, before the bid that I would have made to the company for the deal.

Q. If you had had in mind, or any notion, that there were any oil wells upon the property, the cost of abandonment of which would have been a considerable figure, would that have entered into your estimate of the sum which you mentioned to Mr. Ferer of \$20,000?

Mr. Krasne: Same objection; that the questions that counsel is now asking the witness, that whole line of questioning would only have a bearing if in fact this witness had been the one who had made an offer, or if this witness had been the person to determine how much money would be spent to purchase equipment, and how much was to be taken out.

Mr. Paradise: I will withdraw the question.

Q. Did you have in mind any of the oil wells upon the property, or the cost of abandonment of any of the oil wells upon the property, at the time you mentioned that figure of \$20,000 to Mr. Ferer?

A. I had no idea of anything like that, because I, in my own mind, had had the idea that they were pipe lines.

Q. So far as you knew and were considering at that time, was there anything which was the subject of this sale that you were discussing with Mr. McGahan that

(Deposition of David Zeidenfeld.)

was other than pipe lines and the items of steel that you mentioned, which latter items comprised an estimated tonnage of approximately 600 tons? [80]

A. So far as the estimates are concerned, they took in so many tons of pipe, and so many tons of steel, and I had not been on the property, and I am telling you that I had in my own mind a picture of pipe lines, and whether others bidding had a different picture, that I can't say; but in my own mind I had no idea of oil wells in general, because I did not know they existed on the property.

Q. In referring to pipe, in Mr. McGahan's discussions with you, did he use the words "pipe lines" in that connection?

A. Do you mean in discussions prior to his taking the trip?

Q. I mean in your discussions with Mr. McGahan, not Mr. Ferer.

A. There might have been the word "lines" mentioned once in awhile, but I was looking in general terms of pipe more than anything else.

Q. When you were looking for pipe, as you say, did you have in mind pipe lines or anything else?

Mr. Krasne: I object upon the ground that it has been asked and answered several times. The witness has testified that all references were to pipe. He has also testified that he had some visual picture, an imagination more than anything else, not having seen the property, that the pipe that was on this property was probably pipe line.

(Deposition of David Zeidenfeld.)

A. Mr. McGahan might have mentioned at the time about [81] a certain line here, and about a certain line there, but I personally in general referred to pipe as pipe, and thought of pipe as so many tons of material on the property.

Q. By Mr. Paradise: When you were discussing pipe, and thinking about pipe, were you considering anything other than pipe lines?

A. Not in my own mind.

Mr. Paradise: That is all.

Recross-Examination.

Q. By Mr. Krasne: If you had gone up on the property, and you had seen 100 tons of dismantled pipe on the property, wouldn't you have thought that the 900 tons estimate of pipe on the property that Mr. McGahan referred to would have related to that as well as to any other pipe?

A. The way it was put to me, that all material on the property goes, with the exception of what was told to me, I would assume if there was anything loose on top of the ground, that would have to go in with the deal. If, for instance, a man would put to me "This goes, and this doesn't go, and everything else goes" I would assume that in "everything else" that would go with the deal.

Q. That was the way Mr. McGahan put it to you, wasn't it, to go up and check for yourself; that they wanted to sell everything up there except the items that were excluded, isn't that right? [82]

(Deposition of David Zeidenfeld.)

A. To my knowledge I believe that's the way it was put to me.

Q. You wouldn't call a disjointed pipe, for instance, pipe line, would you?

Mr. Paradise: That assumes a fact not in evidence. There is no showing that there was any disjointed pipe on the property.

Mr. Krasne: I want to find out what this witness had in mind when he said he had a picture, or imagined that the property up there was pipe line. I think the witness conveys an impression he does not mean to convey.

A. The picture in my own mind was that all the property was on the surface, the way, I pictured it in my own mind.

Q. But you did not understand, did you, from your conversations with Mr. McGahan, that if there were some other kinds of pipe on the property, other than pipe line, still Richfield only wanted to sell pipe line?

A. I assumed that what was on the property would go, with the exception of what he told me Richfield wanted to keep.

Q. And you furthermore assumed, from your conversations with Mr. McGahan, did you not, irrespective of what you imagined the type of pipe to be, that Richfield actually wanted a bid to buy all of the pipe that was on this property? Didn't you assume that from your conversation [83] with him?

A. I assumed that everything on the property goes.

(Deposition of David Zeidenfeld.)

Q. So that you don't want the court to understand, from anything that was said between Mr. McGahan and yourself, or anything that you had pictured in your mind, that Richfield wanted to enter into a deal whereby they would sell only pipe line? You did not mean to convey that impression, did you?

A. What I meant to convey was this: That everything on the property goes, with the exception of whatever little few items, such as tanks, and so forth, were to be retained by the company.

Q. And you understood, did you not, that Richfield wanted to sell all of the pipe that was on that property, irrespective of whether it was loose, horizontal or vertical—isn't that what you understood?

A. I understood that was to be the case, although in my mind I did not picture anything as vertical pipe on the property. I assumed that everything would go, but, as I have said before, I did not know there were any oil wells there, so naturally I could not assume there was any vertical pipe on the property.

Q. Didn't you picture, in connection with the refinery, for instance, considerable pipe that would not be horizontal pipe?

A. Well, in refineries there is always some pipe that [84] is vertical pipe too, that goes up on top of stills, or something like that, which would be vertical, but what I mean by vertical pipe lines, what I am discussing in this exchange of questions here, is that I use the term vertical for pipe underground, in the well itself.

(Deposition of David Zeidenfeld.)

Q. Mr. Zeidenfeld, I think in answering these questions you should not be too concerned with what you think the issue in this lawsuit is. You should not be too concerned with any impressions that you may have gathered from any conversations, if you had any, with either Mr. Paradise, myself, or anybody else connected with this litigation. In other words, I would like for you to try to be strictly a witness, and not to think of the issues of the lawsuit, and I think you have; that you have gotten confused; and I want the record to be clear. You certainly, I imagine, assumed that in this 900 tons of pipe which Mr. McGahan thought there was on the property, there would, in the dismantling of the refinery, be some pipe that was not horizontal pipe line, didn't you?

A. There was bound to be some vertical pipe.

Mr. Paradise: Are you talking about the refinery?

Mr. Krasne: For the moment I am talking about the refinery, and in connection with producing equipment in an oil well you would presume, would you not, that when that type of equipment is dismantled, that there would be some pipe coming from it, wouldn't you? [85]

A. Do you mean from a refinery?

Q. Yes, from any oil field that has pipe around it, around oil producing equipment.

A. There is always pipe around an oil field.

Q. You automatically think of such pipe in connection with that type of equipment?      A. Yes.

Mr. Paradise: Are you talking about what is his present impression, or what was his impression at the time he was having his negotiations with Mr. McGahan?

(Deposition of David Zeidenfeld.)

Mr. Krasne: Both. In other words, let us direct our consideration to the time when you had your discussions with Mr. McGahan. At that time you visualized, did you not, that there was a field and a refinery, and that all the producing equipment, and all of the refinery equipment, was going to be dismantled; isn't that what you pictured in your mind?

Mr. Paradise: That assumes facts not in evidence, and I object to it upon that ground. He said he did not know there was an oil field on this property.

Mr. Krasne: He said he pictured something in his mind which he imagined to be a pipe line.

A. I pictured that there must have been an oil field to have a refinery around there, because they are not just putting up refineries just for the sake of having buildings; there must have been a field nearby, but I did not know, in my own mind, whether or not this oil field was on the Richfield [86] property, or whether on the adjoining property with pipes laid therefrom to the property.

Q. I am not for the moment talking about this controversy. I am talking about what you saw in your own mind about this whole deal up there. You pictured the dismantling of a field, didn't you? A. Yes.

A. Yes.

Q. And didn't you assume that when the producing equipment would be dismantled, that out of the salvage there would be some pipe? A. Naturally.

(Deposition of David Zeidenfeld.)

Q. And so, whatever pipe you thought would come from the dismantling of the refinery equipment and producing equipment, of whatever nature would be found up there, you thought, did you not, that Mr. McGahan had included all of that pipe in his over-all estimate of 900 tons of pipe?

Mr. Paradise: I object to that as assuming a fact not in evidence. There is no testimony whatsoever of the dismantling of any producing field, and the witness stated he did not know there was an oil field on the property.

A. I can tell you that I assumed this: That if there was any pipe on the property, I did not picture in my mind any oil wells on the property at all.

Q. By Mr. Krasne: You had not been talking about oil wells; you had been talking about oil pipe?

Mr. Paradise: Let the witness finish his answer. [87]

A. I am assuming this: If all the pipe on the property goes, and there were an oil field on the property, and there was no exclusion made of that pipe, I would probably assume that that pipe goes too.

Mr. Paradise: I move to strike the answer upon the ground that that is his present assumption, the witness not having had any experience at the time of his negotiations with Mr. McGahan.

A. I am only assuming now if the oil wells at that time would have been on the property, I might have thought that maybe I would have asked a question about them. The way I have always pictured it was an oil field off of the property entirely.



(Deposition of David Zeidenfeld.)

Mr. Paradise: Mr. Krasne is inquiring what was your understanding at the time of these negotiations, and not your surmise based upon anything that has happened since the contract was executed.

Mr. Krasne: I think again my question has been misunderstood, and this witness has impressed upon his mind the indelible fact that Richfield and Aaron Ferer & Sons are presently fighting over some pipe in an oil well. The question in substance and effect is this, and it is not for the moment directed to any pipe or anything whatever which Mr. Paradise referred to as casing in oil wells. I am referring to whatever pipe was on this property, from whatever source, did you or did you not understand that when Mr. [88] McGahan estimated there was approximately 900 tons of pipe on the property, that that was an over-all estimate of whatever kind of pipe happened to be on the property? Isn't that what you understood at that time?

A. I assumed that at that time.

(Short recess.)

Q. By Mr. Krasne: Mr. McGahan didn't tell you, did he, that only the horizontal pipe lines were to be sold, and that any other pipe that happened to be on the property was not to be sold?

A. There was no mention of horizontal or vertical.

Q. As a matter of fact there was no mention of any particular type or kind of pipe, was there?

A. There was maybe once or twice a mention of line pipe, but my assumption was merely an assumption of line pipe on the property.

(Deposition of David Zeidenfeld.)

Mr. Krasne: I move that the latter part of the witness's answer be stricken, as being nonresponsive.

Q. Can you answer the question yes or no, Mr. Zeidenfeld? Read the question again, please.

(Question read by the reporter.)

A. Well, there was a mention of pipe made, on the property, and I was mainly seeking out the tonnage of the pipe that existed on the property, and, as far as the types of lines on the property, I believe that Mr. McGahan did mention the term "line pipe" once or twice to me, but I [89] was not interested in line pipe in general, and line pipe only; I was interested in just terms of tonnages of pipe on the property.

Mr. Paradise: May I have the answer?

(Answer read by the reporter.)

Q. By Mr. Krasne: You have had some discussions with Mr. McGahan the last day or two, have you, with respect to your testimony in this matter?

A. Yes, I was here day before yesterday.

Q. You likewise have had some discussions with me?

A. Yes, I had some discussions with you yesterday.

Q. And you have had some discussions with Mr. Paradise, is that right?

A. I had a discussion with Mr. McGahan and Mr. Paradise.

Mr. Paradise: At the same time?

A. At the same time.

(Deposition of David Zeidenfeld.)

Q. By Mr. Krasne: Was there anything said in your conversations with Mr. McGahan and Mr. Paradise which prompted you to now refer so often to pipe and pipe line?

A. The only way, as far as the pipe being termed a pipe line, was because I myself, in my own mind, had a picture that way. It's not that the property itself might not have had some other lines, be they vertical or horizontal. That I knew nothing about. Pipe line to me could just as well mean pipe line running up or down in an oil well the same way.

Mr. Paradise: I move that the answer be stricken as not [90] responsive to the question.

A. But so far as any discussions between Mr. Paradise and Mr. McGahan and myself, I only tried to tell the truth as I saw it at the time I was speaking to them, and I assure you there was no prompting in this matter.

Q. I am sure you are telling the truth. I don't mean by the asking of my question to impute that you are not trying to tell the truth, but sometimes it is possible that when you are discussing these matters stress is put on a particular thing, like pipe line, and that prompts you to, in your testimony, constantly now refer to it as pipe line, when possibly at the time when you had these discussions with Mr. McGahan in truth and in fact it did not enter your mind, because you did not care; you were only interested in the total tonnage of pipe, and so that is why I now ask you whether anything was said in your discussions with Mr. Paradise and Mr. McGahan in which the question of pipe line has been stressed.

(Deposition of David Zeidenfeld.)

A. The only questions they asked of me, when I was up here, speaking about this word pipe lines, they might have asked me whether or not Mr. McGahan in his conversation with me had brought up pipe lines only going. I did not hear anything like that from Mr. McGahan, but we were just talking in general terms of pipe. I again repeat that the term "pipe lines" is just something that has been in my mind from the start of the deal, which I assumed was lying on the ground, [91] or a few feet underground; but, after all, this deal is like a lot of other deals; you might go on with a certain dealing, and you might think something is so-and-so, and find out that it is different when you go there and inspect it.

Q. Didn't Mr. McGahan and Mr. Paradise, in their discussions with you, explain to you the difference between what they call casing in an oil well, and other kinds of pipe line?

A. They at that time made it clear to me what a casing is, and what a pipe line is, yes.

Q. Actually, before Mr. McGahan and Mr. Paradise, in the last two or three days, made that difference clear to you, the difference between casing in a well and pipe line, you did not have a very definite understanding of the difference in your own mind, did you?

A. I figured that casing could just as well be used for a pipe line as anything else.

Q. And, conversely, pipe line is pipe in any oil well, through which oil is brought up, isn't that it?

(Deposition of David Zeidenfeld.)

A. That's right. I knew of casing being used in an oil well, but I also knew that casing could be used for a pipe line for the transportation of materials horizontally, as well as vertically. I did not have a clear picture in my mind, and they made it clear to me.

Q. Prior to that occasion, the last day or so, when [92] Mr. McGahan and Mr. Paradise made clear to you what is pipe line and what is casing in this business, pipe line and casing in a well was all just pipe?

A. That's right.

Q. It had always been so regarded by you, as pipe, until this difference was made clear to you the last two or three days?

A. That's right, inasmuch as we were in the junk business, we were looking in terms of pipe, whereas, if we had a pipe yard or oil well supply company, we would use the specific terms pipe line and casing. We did not have any reason to use pipe and casing; the only thing in the world was that pipe is anything that has a hole in it and is round.

Q. So, in all fairness to everybody connected with this action, when throughout your testimony today you say that what you had in mind, when Mr. McGahan told you there was approximately 900 tons of pipe on the property, what you had in mind was pipe line—you used the word pipe line in the light of the explanations about pipe line that have been made to you by Mr. Paradise and Mr. McGahan, isn't that correct?

A. Pipe line to me, avoiding the question just a little bit, is anything through which materials are transported, and I assumed in my own mind—I am not assuming what

(Deposition of David Zeidenfeld.)

others thought—when something is brought before you you gather a little picture, and the picture I had in mind was something [93] for the transportation of materials on the level, or a few feet under. That could be casing, or could be line pipe, but so far as casing, you know, that is just line pipe to me. It is all just pipe. I look at it that way. Inasmuch as I had no idea of any oil wells on the field, I could not, in my own mind, get a picture of any such thing as something going up or down. The only picture I could gather was pipe being used for the transportation of oil from the tanks to the refinery, or something of that nature.

Q. One more question and I am through, and I may have asked you this before, but, in any event, what you understood from Mr. McGahan, at the time you had your conversations with him and thereafter, was that the Richfield Oil Corporation wanted to sell whatever pipe, and whatever equipment was on the Casmalia property, except the specific items that they desired to withhold, and which items you were told about?

A. That is what I had in mind.

Mr. Krasne: That is all.

Redirect Examination.

Q. By Mr. Paradise: Mr. Zeidenfeld, Mr. Krasne inquired about a conversation with you, that occurred two days ago in my office, at which Mr. McGahan was also present. I am not sure of what implications Mr. Krasne intended by his question, but will you state exactly what occurred at [94] that meeting?

(Deposition of David Zeidenfeld.)

A. As nearly as I can recollect, Mr. McGahan asked me to come up here to see what I knew about this deal. I did not know anything about any lawsuit between Aaron Ferer & Sons and the Richfield Oil Corporation. I heard something vaguely, about something about to take place, but I had no idea it had gone this far.

Q. You mean you had heard, prior to the time you came to the meeting, that there was a lawsuit in existence?

A. I heard from a few fellows on the street that there was some kind of a lawsuit taking place between them. I figured, inasmuch as nobody called me about it all this time, that you could get along yourselves without me on the deal. So when I was called to come up here, I did not know what it was all about, and the questioning that took place up here was merely something on the same order as the line of questioning here, as to about the time I first called on Mr. McGahan about the deal, and then a little later of how I came to Mr. Ferer, like I spoke about here, about the deal; then all of a sudden Mr. Clements was in the deal, and I was left out entirely. I think you will bear me out on it; if there is anything I don't remember exactly about it, you can prompt me a little, and I can make it clear.

Q. You say that I can prompt you now?

A. If you can prompt me now as to what I might have said, I will bear you out on it, if I said it. [95]

Q. You mean you don't recall exactly what occurred?

(Deposition of David Zeidenfeld.)

A. Outside of that it was just more or less of an idea of how the thing stood from the time of my entering into the conversations with Mr. McGahan up to the deal itself.

Mr. Krasne: May I, just for the purpose of the record, so that I will not be misunderstood, state that I don't for one second mean to convey an impression that either Mr. Paradise or Mr. McGahan would do anything improper, or that anything improper was done in connection with the discussions between them and this witness, nor do I believe that this witness would deliberately make any misstatement to help either side in this litigation; and, except for the implication that, after the discussion which this witness had with Mr. Paradise and Mr. McGahan, in which he learned for the first time the difference between casing in oil wells and pipe lines, that there is, under those circumstances, a possibility, if not a great likelihood, that when the witness now testifies as to what he had in mind about pipe lines and casing, that those opinions, those recollections, would naturally be influenced by the explanations that have been recently made to him.

Mr. Paradise: I will accept Mr. Krasne's statement that nothing improper occurred at the meeting, but I can't accept Mr. Krasne's statement that the witness was told on that occasion, or any other occasion, either by Mr. McGahan [96] or by myself, as to the difference between pipe lines and casing, or what the terms in themselves mean, and I want to explore the matter of this conversation still further, since Mr. Krasne has seen fit to bring it up.



(Deposition of David Zeidenfeld.)

Q. At that meeting, Mr. Zeidenfeld, did anything occur other than questions by myself as to what had happened in your negotiations with Mr. McGahan?

A. Outside of what happened with Mr. McGahan there couldn't have been any more questions about it, because that was the only thing that could have taken place between you and myself, because that was all we had between us, and I never entered into the deal after Mr. Clements and Mr. Ferer got together on it.

Q. Had you ever known me or seen me prior to that conversation?

A. I never saw you before.

Q. Did I suggest, or instruct, or prompt you, in any manner, as to what would be your testimony either at this deposition or in court?

A. No, you didn't.

Q. Did I do anything, other than ask you as to your recollection of this transaction?

A. That's right.

Q. Do you recall, in answer to Mr. Krasne's statement, that you stated that the difference between casing and pipe was made clear to you at that meeting? [97]

A. In this manner: I was referring to pipe in general, and I don't remember whether I asked Mr. McGahan something about it. I was talking about everything in terms of pipe, and I think I mentioned casing once or twice. I don't remember whether it was you and Mr. McGahan told me, or maybe I asked the question, "Now, is casing only in oil wells, or in lines, this way?" It was made clear to me, but there wasn't anything gone into any further as to what constitutes casing or otherwise, outside of that question.

(Deposition of David Zeidenfeld.)

Q. Is it not correct, Mr. Zeidenfeld, that the only mention of either pipe or pipe lines or casing, which occurred at that meeting, was when I asked you what you meant when you referred to pipe line or casing?

A. I told you at that time I figured it all this way, didn't I: I don't remember telling you that casing in my estimation was in oil wells, and I think that somebody made it clear to me that casing is in oil wells only, and line pipe is the other way.

Q. When you say somebody made it clear to you—

A. They didn't go into a full explanation. It was just put to me "You mean casing in a well, don't you?" They made it clear to me that casing was casing in an oil well. It was brought about as I just mentioned. Let us put it this way: Casing was only mentioned to me, as I just said. I was mentioning line pipe, casing and pipe. I [98] think I must have made about five or six references to the same thing, and at one point, either you or Mr. McGahan said "You are referring to casing in the well?" or something of that nature; and from that inference I concluded right there and then—I left the word "casing" out of line pipe from there on, and started using "line pipe," because I figured casing must be in the well, because of the little inference like that. Whether that has any bearing on this I don't see.

Q. Did either Mr. McGahan or myself at that meeting ever instruct you as to the meaning of those terms, or did we merely inquire as to your definition of those terms?

A. It was put to me just like I said before, and I don't think that you gave me a definition of it, but in your little question I sort of got the definition right there and then in my own mind, and started using it the other way.

(Deposition of David Zeidenfeld.)

Q. Had the word "casing" ever been used in your discussion with Mr. McGahan? When I say your discussion with Mr. McGahan, I mean any of your conversations with Mr. McGahan, during the negotiations?

A. That I don't remember.

Q. Do you recall that it either was or was not used? Had you ever heard the word "casing" mentioned in those conversations?

A. I don't recall, and I wouldn't want to say; it's been so long ago. [99]

Q. Isn't it correct that the word "casing" was first used in the conversation in my office two days ago, when you inquired of me what the controversy was between Aaron Ferer & Sons and Richfield Oil Corporation, and I told you that they were suing for the purpose of obtaining the right to remove the casing in the wells on the property? [100]

A. I may have gotten the inference from that or another question you might have asked me pertaining to whether "you mean casing in the well?" I might have asked you something of the same question, but I picked it up pretty quick from there on, and I made up my mind to quit using the word "casing."

Q. I am afraid, in answering me you give a different impression or implication than what you intend to mean. When you say you picked it up pretty quick, do you mean that I either instructed you or prompted you as to what your answer would be either in this deposition or at the time of the trial?

(Deposition of David Zeidenfeld.)

A. No, there was no prompting. It was my own free will. I thought I was coming up here for some kind of dealings of some nature.

Mr. Krasne: I want to say, for the purpose of the record, again, that I am sure Mr. Paradise did not prompt this witness. I want the record itself very clear that I don't suspicion that he prompted the witness. The only point is, that after that kind of a discussion, I think this witness formulated certain impressions; that those impressions crept into the testimony, as if they were impressions dating back to the original discussions, and that in my own mind I think that nothing ulterior was intended. I want the Court Mr. Paradise and Mr. McGahan to know that.

Mr. Paradise: In order that I can bring this part of the inquiry to a close, I presume *you* statement applies [101] equally as well to any part Mr. McGahan had in the same conversation?

Mr. Krasne: Yes, I want the record to so show.

Q. By Mr. Paradise: Is your answer the same with respect to Mr. McGahan's portion of that conversation?

A. My answer is definitely yes; there was no prompting of any nature, and anything that I said was done by myself, without any line of questioning to lead me to believe anything else but what I previously knew, outside of what I picked up for future references, but which did not have anything to do with this, so far as I know.

Q. One further question in that regard: Mr. Krasne, at the conclusion of his examination of you on that subject matter, asked if it was not true that all of your questions and answers with respect to pipe and pipe lines,

(Deposition of David Zeidenfeld.)

which you mentioned in your discussions with Mr. McGahan and with Mr. Ferer, should not be read in the light of the conversation that you had in my office, where the difference between casing and pipe or pipe lines was made clear to you. By your answer to Mr. Krasne's question did you intend to change in any respect any of the answers that you made to any of the previous questions on those subject matters?

A. Can I have read the question Mr. Krasne gave me? It might be I misunderstood the question, and gave an answer I shouldn't have given.

Mr. Paradise: Yes, I would like to clear that matter up. [102]

(The following question was read by the reporter: "Q.—So, in all fairness to everybody connected with this action, when throughout your testimony today you say that what you had in mind, when Mr. McGahan told you there was approximately 900 tons of pipe on the property, what you had in mind was pipe line—you used the word pipe line in the light of the explanations about pipe line that have been made to you by Mr. Paradise and Mr. McGahan, isn't that correct?")

Mr. Paradise: I think it would be clearing the record if that question would be repeated here as having been again read to the witness.

Mr. Krasne: Read it to him again, if you like. I think the question was a fair, intelligible and proper question, and I think the witness' answer is truthful and correct, particularly in the light of the few questions I asked that preceded that question.

(Deposition of David Zeidenfeld.)

Mr. Paradise: I would like to have the record repeated, that particular question as well as Mr. Zeidenfeld's answer to it.

Mr. Krasne: Again, so that the record will be clear, do I understand that counsel is trying to impeach the credibility of his own witness here, or for what purpose counsel is asking this question? The question has been asked and answered.

Mr. Paradise: This is not for the purpose of impeachment. [103] This is for the purpose of clearing up the witness' entire line of testimony, and particularly in answer to Mr. Krasne's questions as to what occurred at the conversation between Mr. McGahan, Mr. Zeidenfeld and myself two days before this deposition occurred. Will the reporter re-read to the witness both the question and the answer to which we have referred?

(The reporter here read question and answer appearing on page 93, line 14, to and including page 94, line 9.)

Q. By Mr. Paradise: By your answer to that question of Mr. Krasne, did you intend, Mr. Zeidenfeld, to change any of the testimony that you have previously given regarding your conversations with Mr. McGahan and Mr. Ferer, or your understanding at the time of those negotiations, as to what particular items of equipment were being sold?

A. I can only maintain that I still had no knowledge of oil wells on the property, and that all pipe that was being sold was pipe that was up on the surface, or a few feet beneath the surface, on a horizontal plane, with the exception of maybe a few vertical pieces being used in the refinery, going up and down a tank, and that was about all.

(Deposition of David Zeidenfeld.)

Q. Has your testimony been changed or colored or altered in any respect as to what your recollection of those negotiations was, and as to what your recollection of your understanding at that time was, by any conversation that occurred between you and Mr. McGahan and myself two days ago? [104]

A. No, it has not.

Q. In answer to one of Mr. Krasne's questions, I think you stated that Mr. McGahan said that there was approximately 900 tons of pipe, and you assumed that that was all kinds of pipe that were upon the property, is that correct?

A. I assumed it was all kinds of pipe on the property.

Q. At that time did you have any notion or knowledge whatsoever that there was any pipe on the property other than pipe lines and interconnecting lines around the refinery?

A. I had no idea otherwise.

Q. And when you have mentioned that you intended to get all vertical pipe lines there were on the property, have you reference to anything other than the pipes that are running in a vertical direction up and down the tanks, above the surface of the ground, around the refinery?

A. In my own mind I did not picture it as anything outside of what you have just asked me.

Q. Did Mr. McGahan ever state to you that everything on the property goes with certain exceptions?

A. I assumed that.

Q. Did he ever state that?

A. I don't recall that he stated that. I recall this: That he told me to go up and look at the property, and

(Deposition of David Zeidenfeld.)

see Mr. Duncan, and he will show me exactly what goes on the property, but to leave those things out of it I did not see, [105] for the time being. He said "Just leave those items." He gave me a little list not to figure on at all, because O. C. Field and some other people had something to do with them.

Q. Did Mr. McGahan state that with the exception of those items everything else on the property goes?

A. I assumed everything else goes.

Q. You assumed that, or did Mr. McGahan state that?

A. I don't recall exactly whether he stated it or not, but from the method of dealings with him, and giving me a few exceptions that don't go, I would naturally assume that everything else went, although I had no knowledge of anything that was on the property outside of pipe lines in general; and by the term "pipe lines" don't misunderstand the fact that I am just using this; I have always referred to pipe running this way, running horizontal, as a pipe line.

Q. Did Mr. McGahan use the words "pipe line" or "line pipe" in his conversations with you?

A. I think I answered that question before some two or three times, didn't I?

Q. Your answer is—

A. He might have mentioned it once or twice in the dealings, but there wasn't too much discussion, and after all, in a discussion you can't remember every word that goes on. There might have been other things mentioned that I don't even think about, because they are unimportant



(Deposition of David Zeidenfeld.)

[106] to me, because I am only interested, as I have repeatedly stated in this deposition, what I was mainly interested in was tonnage of pipe, or tonnage of steel.

Q. Is it your recollection then that when you testified that everything on the property goes, that that was merely your assumption, and not anything that Mr. McGahan ever said to you?

A. He might have mentioned it, and still again, I might have assumed in my own mind, and built up the story myself.

Q. But you don't recall that he ever stated it, is that correct? A. He might have stated it.

Q. Do you have any recollection either that he did or did not?

A. It is too long to remember. I wouldn't want to say, being under oath, that I do remember when I don't.

Mr. Paradise: That is all.

#### Recross-Examination

Q. By Mr. Krasne: You assumed that everything except the specifically excluded items, were to be sold in the same manner that you assumed because of something that you pictured in your mind, that all the pipe on the property was the pipe lines, isn't that so?

A. I assumed that all pipe on the property would go. [107] It was mostly referred to in the conversation between Mr. McGahan and myself as pipe on the property.

Q. In any event, whether, from what Mr. McGahan said to you or not, when you left his office you left with the belief in your own mind, did you not, that the Richfield

(Deposition of David Zeidenfeld.)

Oil Corporation intended to sell all of the pipe and all of the equipment that they had on the Casmalia property, except for the items which they specifically excluded?

A. That was my assumption.

Mr. Krasne: That is all.

Mr. Paradise: That is all.

David Zeidenfeld. [108]

[Certificate of Notary] Endorsed: Filed Feb. 23, 1942. [109]

In the District Court of the United States for the Southern District of California, Central Division.

Aaron Ferer & Sons, a copartnership, Plaintiff, vs. Richfield Oil Corporation, defendant. No. 1718-H.

Depositions of T. H. Clements and Morris Ferer, witnesses produced, pursuant to the written notice on file herein and the oral stipulation of counsel for the respective parties, on behalf of the defendant in the above-entitled action, now pending in said court, before Ross Reynolds, a Notary Public in and for the County of Los Angeles, State of California, in Room 1221 Richfield Building, 555 South Flower Street, Los Angeles, California, on Friday, February 6, 1942, commencing at the hour of 10 o'clock a. m., and on Saturday, February 7, 1942, commencing at the hour of 10:30 o'clock a. m.

Present:

Philip N. Krasne, Esq., and Carl Sturzenacker, Esq., for Plaintiff.

Robert E. Paradise, Esq., for Defendant. [1\*]

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\*Page number appearing at foot of original depositions.

T. H. CLEMENTS,

a witness called by the defendant, being first duly sworn,  
testified as follows:

Direct Examination

Q. By Mr. Paradise: Where is your business address, Mr. Clements?

A. 8330 Atlantic Boulevard, Bell, California.

Q. And what is the nature of your business?

A. I am a second-hand dealer in machinery, pipe, valves and so forth.

Q. What is the name of your company?

A. Refinery Equipment Company.

Q. Are you the sole owner of it?

A. I am the sole owner. In other words, I am running it under that name as a d. b. a.

Q. Do you buy and sell junk equipment of any sort?

A. Yes; I not only buy and sell but then I do a lot of salvage work, tearing down plants and that sort of thing to get salvage equipment to be able to recondition it and sell it.

Q. You do the work of abandoning and salvaging and then resell it, is that right? A. That is right.

Q. How long have you been acquainted with Mr. Morris Ferer? [2]

A. About a year and a half. I would say.

Q. I meant to ask you in connection with that other point, do you specialize in any particular type of oil well equipment? Do you specialize in refinery equipment?

(Deposition of T. H. Clements.)

A. That depends. In other words, it is a catch as catch can in our business. We not only sell to refineries but we sell to producing companies and to chemical manufacturing companies, asphalt plants and lube reclaiming plants. It is a most general industry, you might say.

Q. Is the type of equipment you handle refinery equipment or is it producing equipment?

A. Well, we handle some of all of it, as far as that goes.

Q. Is Aaron Ferer & Sons a competitor of yours? Are you engaged in exactly the same types of business?

A. Well, Aaron Ferer is relatively a new company here. They came in with the primary object of being junk dealers and then they have since branched out into salvage work, which is more or less competitive to my work, you might say.

Q. In this transaction between Aaron Ferer & Sons and the Richfield Oil Corporation, did you have any interest in that transaction?

A. My interest lay—or, in other words, you might say I was a promoter. For many years prior to the time that this deal came up, I had been salvaging plants incidentally and similar layouts and incidentally I had salvaged two or [3] three plants for the Richfield Oil Company prior to this instance.

Q. What was your exact connection in this transaction? Did you have a share in the profits?

A. The profits only. Yes; it was profit-sharing. In other words, you might say I was a promoter of the deal.

(Deposition of T. H. Clements.)

Q. Did you get a commission from Aaron Ferer & Sons?

A. No; no commission. I was to get a percentage, as a matter of fact,  $33\frac{1}{3}$  per cent, of the net profits after the deal was all consummated and all the profits were in.

Q. Did you have a written contract with Aaron Ferer & Sons? A. It was verbal.

Q. With whom did you make that?

A. Mr. Aaron Ferer, or I mean Mr. Morris Ferer.

Q. And what percentage did you say you were to get?

A.  $33\frac{1}{3}$  per cent of the net profits.

Q. Were you to put up any of the capital required for the payment of costs of salvage?

A. No. What I did was this. I had a crew organized in the fields for salvage work and I put my crew up there and, incidentally, in the transaction I also had to put my equipment trucks and rigging equipment and materials like that up there, and my services in the removal of the equipment and in the sales of that equipment, for which I received no recompense other than an interest in the net [4] profits.

Q. Did you charge Aaron Ferer & Sons for the use of that equipment and crew?

A. Not any equipment. There was no charge made for the equipment, either trucks or that sort of material. And my crew, instead of being carried on my payroll, were transferred and carried on Mr. Ferer's payroll and it was to all appearances his men. They were carried on his payroll there during the interval of the job and he carried the compensation insurance and other liabilities.

(Deposition of T. H. Clements.)

Q. He was to pay all of the cash charges and costs, is that correct?

A. All of the cash charges and costs; yes.

Q. And you furnished the equipment, without making any charge?

A. Yes. And I spent two or three days a week up there at the job, supervising more or less the removal of the equipment. And at the same time, when I was back in Los Angeles, better than half of my time was actually engaged in the sale of the merchandise as fast as we removed it and other things incidental to it.

Q. Did you make the sales or were the sales made by Aaron Ferer & Sons, the sales of the salvaged equipment?

A. I made them all myself but they were sold across their sales sheets. In other words, I was merely acting for them. In other words, all of the sales were made by Aaron [5] Ferer & Sons and so written on all of the delivery tickets, receipts, invoices and so forth.

Q. What equipment did you furnish?

A. I supplied three trucks—one of them was a winch truck—and cables and tools and general salvage equipment, tackle and materials like that.

Mr. Paradise: I might state for the purpose of the record that it was my understanding that, by the order of Judge Hollzer, that I think was made on December 3rd, where it required the production of certain documents to be used at the taking of this deposition, it would be unnecessary to serve a subpoena for those and that, under an agreement between Mr. Krasne and myself, the production by stipulation would have the same effect as if the documents were subpoenaed. Is that correct?

(Deposition of T. H. Clements.)

Mr. Krasne: Yes; that is correct.

Q. By Mr. Paradise: Mr. Clements, the order of court to which I have just referred required the production at the time of the taking of this deposition of various documents. Have you read the order of court?

A. No, sir.

Q. I will read the documents that were required to be brought here. This is Item (a) of the order: "All written memoranda, records, tabulations, estimates and correspondence, prepared during the years 1940 and 1941, by Morris Ferer, T. H. Clements and Aaron Ferer & Sons, or by any of their [6] employees or agents, pertaining to the purchase by Aaron Ferer & Sons of facilities and equipment from Richfield Oil Corporation or pertaining to facilities and equipment to be purchased by Aaron Ferer & Sons from Richfield Oil Corporation." What documents have you brought under that provision of the order?

A. I haven't any. Mr. Krasne asked if I had any documents and I told him no, we had no correspondence as the Refinery Equipment Company or as T. H. Clements, an individual. I helped Mr. Ferer prepare, I believe, one of the original letters of the original proposal of purchase but then I never had any correspondence with Mr. Ferer or with the Richfield myself on this transaction.

Q. You never did what?

A. I never had any direct correspondence myself with the Richfield on this transaction.

Q. Did you prepare any memoranda concerning this purchase? A. Oh, no.

(Deposition of T. H. Clements.)

Q. You made no written memoranda of any nature at the time of the negotiations, is that correct?

A. No; that is correct.

Q. Do you have any records that were made before this contract was signed, relating either to the purchase or relating to the property that was to be purchased?

A. No.

Q. You made no record of any sort?                      A. No.

Q. Did you make any tabulations of the property that was to be purchased?                      A. No.

Q. Did you make any estimates of the amount that was to be offered for this equipment?

A. If I did, I made them on my cuff, you might say, or on scratch paper that was thrown away at the time. I never retained any. There is nothing in my files now.

Q. You have nothing now that you made?

A. No.

Q. Have you searched your files on that?

A. Yes; I went back and checked them after Mr. Krasne called me yesterday, and I have nothing at all.

Q. Do you have any correspondence, either with Aaron Ferer & Sons or Richfield—or I will eliminate Richfield in the light of our conversation with Judge Hollzer. Do you have any correspondence with Aaron Ferer & Sons relating to this purchase?

A. No. It was all verbal at the time. There was no written correspondence.



(Deposition of T. H. Clements.)

Q. The second item, Item (b) in the order of court, was to require you to bring to this deposition all written memoranda, records, tabulations, estimates and correspondence, prepared during the years 1940 and 1941, by Morris Ferer, [8] T. H. Clements and Aaron Ferer & Sons, or by any of their employees or agents, and used by them in estimating the price of \$22,000 offered to Richfield Oil Corporation by Aaron Ferer & Sons as the purchase price for such facilities and equipment. Have you brought any documents under that provision of the order?

A. No; I have no documents.

Q. You made no memoranda of your estimates of this purchase?

A. No.

Q. And no records or tabulations or instruments or correspondence, is that correct?

A. Not a thing.

Q. You have nothing of any sort?

A. No.

Q. Have you made a search for documents of that sort?

A. Yes.

Q. What did you search?

A. My files.

Q. Your office files?

A. That is correct.

Q. Would you have any such similar documents any place other than in your office?

A. No.

Q. Item (c) of the order is to produce copies of all logs and histories and drillers' reports or records of or [9] pertaining to any wells located upon the land of Richfield Oil Corporation, described in the contract dated January 17, 1941, attached to the amended complaint herein. I understand you do have documents of that nature, is that correct?

(Deposition of T. H. Clements.)

A. I have the log books and I have the maps and the well profile maps.

Mr. Paradise: I might state for the record that, under an arrangement with Mr. Krasne, those were not required to be brought this morning.

Mr. Krasne: That is right.

Q. By Mr. Paradise: You say you have the log books. And what else?

A. Not only the log books but the profile maps made from those log books.

Q. Made by whom? Do you know? Were they made by you?

A. Oh, definitely not. They were made years ago by the geologists up there on the lease.

Q. Do you have the histories of the wells?

A. Yes.

Q. For what period?

A. That is included in the log books which show every well as far as I remember and a complete log of the drilling of each well.

Q. That is up to what date? Is that up to the date of the completion of the well as a producing oil well? [10]

A. Yes. Not only that but we have got the records—I don't know just how complete they are—as to the production of the wells after they were completed.

Q. Do you have the records of what was done to the wells subsequent to the completion of any of the redrilling work?

A. Yes.

(Deposition of T. H. Clements.)

Q. Or plugging back operations?

A. Yes; plugging back operations. That is included in these log books.

Q. Where did you get these records?

A. They were in the geologist's room in the production building, I would call it, up on the Soladino lease.

Q. Those were kept locked up in one of the warehouses, were they not?

A. They were not locked. It was in a warehouse which at various times was open. In other words, several times I had strolled in there and once or twice I noticed it was locked. Sometimes it was locked and sometimes it wasn't. It was an office larger than this office and they were around the wall there on shelves.

Q. You have those now at what point?

A. They are in my safety vault, fire vault, at my place at the Refinery Equipment Company, 8330 Atlantic Boulevard.

Q. When were they shipped to your office? [11]

A. We had two or three engineers or well pullers look at them up there, I believe it was, in May or June of last year.

Q. That is, 1941?

A. Yes. And then we thought we would bring them down here so we could cross-reference them and probably get some more ideas from probably some other source down here at that time we brought them down.

(Deposition of T. H. Clements.)

Q. When was that? Can you fix the time when you brought them down?

A. Around the 1st of June, 1941.

Q. When was the first time you saw those logs, Mr. Clements?

A. That rolls back the years quite a few years. I was in Santa Maria when they were drilling those wells originally and at that time I worked for the Union Oil Company at Orcutt, which was only three or four or five miles away.

Q. I am not talking about the original making of the records. I am talking about the records that were stored in the warehouse.

A. That is what I am talking about. I was in the building at the time. It was quite a drafting office. And I saw some log books being made at the time because I was acquainted with some of the men at the time there at the lease. [12]

Q. I didn't hear you.

A. I was acquainted with some of the men at the lease in those days. I have covered that territory buying and selling for years. And I guess I saw them again about four or five years ago when I was going through the property and looking it over.

Q. Four or five years ago?                      A. Yes.

Q. Before there was any thought of abandoning the property, is that correct?

A. Well, before they had any authorization to abandon it, I had been after Mr. McGahan for several years, trying to purchase that stuff up there.

(Deposition of T. H. Clements.)

Q. Those records were all stored in a warehouse, you say?  
A. Yes.

Q. Did you examine those records prior to the time when this deal was consummated and did you examine them in the warehouse?

A. Casually. In other words, I didn't go through every one. I checked some of the wells over at that time.

Q. When was that?

A. I would say four or five years ago.

Q. But during the time that the negotiations for this contract were going on, you did not examine them, isn't that correct? [13]  
A. That is right.

Q. And the first time you saw those logs was after this transaction was consummated and the contract was signed and after you had commenced doing work on the dismantling, is that correct?

A. No. That question is ambiguous. That isn't the first time I had seen them. I had seen them previous to that.

Q. That was the first time you saw them in connection with this transaction between Aaron Ferer & Sons and Richfield, however, is that correct?  
A. Oh, yes.

Q. What was the first work that was done on the contract, or I mean on this job, after the contract was signed?

A. Well, you might say we started digging ditches more than anything else, on account of the weather. We couldn't get on the property on account of the rains.

(Deposition of T. H. Clements.)

Q. The date of the contract was January 17, 1941?

A. Yes.

Q. How soon did you commence work after that date?

A. I would say within a week or ten days.

Q. It was some time after that that you dismantled the building or warehouse in which these records were kept, is that correct?

A. We didn't dismantle that until around June or the last of May; May or June. As a matter of fact, we had to [14] keep those buildings there for the men to go in to get out of the rain. It was raining there three or four months practically solid and it handicapped us.

Q. When was the first time you examined those records after this contract was signed?

A. Within about a week, when I went up with a crew. I went over those records pretty thoroughly at that time.

Q. That was about a week after the contract was signed?

A. That is right.

Q. But I understood you to say that prior to this time the contract was signed you had not examined them for four or five years?

A. That is right.

Q. I suppose you knew nothing as to any work that had been done on any of those wells in that five-year period?

A. Oh, yes. I had been over the lease several times in that last five years and about a year prior to the time that this came up they had gone in there and taken down the derricks that had fallen over and removed all of the drilling equipment, you might say, on the surface.

(Deposition of T. H. Clements.)

Q. Did you watch that operation taking place?

A. I wasn't there when it was done. They were doing some clean-up work the last time I was there, burning up a lot of old derrick timber and so forth, but they had removed the steel and the pipe and so forth. [15]

Q. When was that?

A. I would say that was in the midsummer of 1940.

Q. During the summer of 1940? A. Yes.

Q. Did you watch the work progressing?

A. Well, as I say, at the time I had seen it they had removed all these old steam engines and all of the old drilling equipment, most of the drilling equipment that was capable of being removed. That had been pretty much removed when I was there. They were cleaning up and hauling off timber.

Q. Were they doing any work on any of the wells when you were up there at that time?

A. I didn't see any.

Q. What was the occasion for your trip up there at that time?

A. I cover that territory all the time through there. I make periodic sales trips, you might say, over to the O. C. Fields Casmite plant and then I used to come down and make sales trips, at the foot of the canyon in there, to the Black's Incorporated plant.

Q. You were just examining the territory to see what was occurring, is that correct?

(Deposition of T. H. Clements.)

A. Not only that but also trying to sell equipment, pipe, valves, fittings, tanks, or whatever they wanted.

Q. At that time you say the derricks had already been [16] removed and the tubing had been removed from the wells, did you say?

A. Well, the surface or sucker rods and crown blocks and all of that sort of thing had been hauled off.

Q. Do you know whether any tubing had been removed from the wells at that time?

A. I couldn't tell but I had talked to them around along the avenue there at Santa Maria and found they had pulled part of the production piping.

Q. When you refer to the production piping, do you mean tubing?      A. Production strings.

Q. Did you know at that time whether those wells had been abandoned?

A. I had asked over there and they told me they had and they just pulled the strings.

Q. Who did you ask?

A. Some of the drillers along the avenue; either that or over at O. C. Fields or some place around there.

Q. Did you ask any Richfield employees?

A. I never talked to any Richfield employees.

Q. What did the wells look like when you saw them?

A. At what time?

Q. At that time, after the derricks had been pulled.



(Deposition of T. H. Clements.)

A. The pipe was stubbed up, with the stub sticking out of the ground at various heights, three or four or five [17] feet high.

Q. It was capped, was it?

A. It was stubbed and capped with a cast iron cap.

Mr. Paradise: For the purpose of the record I want to move before we go further to strike the witness's answers as to his conversations with any persons, other than employees of the Richfield Corporation, on the ground that they are hearsay.

Q. What was your first knowledge, Mr. Clements, of Richfield's desire to sell equipment and facilities from that property? When was the first time you learned of that?

A. It had been under discussion three or four years both by the salvage division at Long Beach, under McGahan, and also by Mr. Harold Davis, who I was buying equipment through from time to time. It had been discussed by all of us on various occasions and at that time they had said they were trying to get releasement from the various departments so that that equipment up there could be sold.

Q. Mr. Davis is the assistant purchasing manager of the Richfield Oil Corporation, to identify him?

A. I believe that is his title. I don't know.

Q. Did he notify you that Richfield was ready to make this sale?

A. I don't remember whether it came from him. Yes; I believe it was. I was talking to him and he said that he

(Deposition of T. H. Clements.)

was having McGahan make an inventory figure or valuation and [18] in the near future, after a lot of the procedure had been gone through, they would be willing to take bids on that material.

Q. He phoned you and told you that, did he?

A. No. I think that took place when I was in his office on some other matters.

Q. Do you recall when that occurred?

A. I would say that was around September of 1940.

Q. Did Mr. Davis subsequently tell you that Richfield was then in a position to make the sale and request you to submit a bid on it?

A. I believe some time in November he phoned me or that when I was talking to him over the phone he told me to contact McGahan because McGahan was getting down to the point where they would be willing to talk business pretty quickly.

Q. What was the next conversation that you had?

A. With whom?

Q. With any Richfield employee, concerning this purchase. As I understand it from your answer, and is this correct, at that time of that conversation you just mentioned, Richfield was not yet in a position to make the sale and you would be notified later, is that correct?

A. At that time they had gotten to the position where they were making an inventory set-up so that they could take it up both with the manufacturing and the production [19] divisions about the retirement of this material.

(Deposition of T. H. Clements.)

That was, as I say, in September. Of course, I was calling on McGahan about every week or so down there and then I was pretty much in contact with Mr. Davis. So I can't place which time the next conversation took place.

Q. Can you fix the time when the transaction was ready to be bid upon and with whom you had a conversation, with what Richfield employee?

A. The last step was when Mr. Davis told me to get in contact with McGahan and that McGahan would be calling for bids very shortly. I think that was the general context of the conversation.

Q. Was that all that was said?

A. That is all I recall.

Q. Did Mr. Davis outline to you the particular facilities and equipment that were to be sold in that conversation?

A. No. As a matter of fact, at that time I don't believe they knew what they wanted to let go; that the thing was more or less indefinite and hazy.

Mr. Paradise: I move to strike that as a conclusion of the witness.

A. Well, that is the impression I got.

Q. Just state, Mr. Clements, what was said to you rather than what you thought. Then what occurred? Did you talk to McGahan? [20]

A. Yes; I talked to McGahan.

Q. Where did that conversation take place? Was it in the Richfield office?

(Deposition of T. H. Clements.)

A. In his Long Beach salvage office.

Q. And will you state what occurred? Were there just the two of you present?

A. Yes. I don't remember of talking with him in front of anyone else.

Q. And can you fix the time of that conversation?

A. Well, it was, I imagine, around the 1st of December of 1940.

Q. What was said as closely as you remember?

A. He said that I had better go up there and take another look at it; that they would call for bids pretty quick. And I remember at the time asking him if there was any deadline on it and, as I recall, he said there was no definite deadline, although I wouldn't take oath to that remark. And when it came to that point, then, of course, I knew it involved more money than I had and then I started looking around to see who I could get to help underwrite it.

Q. Was there any statement by Mr. McGahan as to what facilities and equipment Richfield was willing to sell?

A. As I recall, he said he wanted to sell everything with the exception of six big storage tanks and some other equipment which had been previously sold or was under process of being sold at the time. [21]

Q. Did he say that any tanks were to be left on the property, that were not to be sold?

(Deposition of T. H. Clements.)

A. Yes. He particularly emphasized all through the conversation that they were to withhold from the sale six big steel storage tanks.

Q. Did he say why he wanted to retain those?

A. Yes. He said the production department were figuring on taking them and using them over at Maricopa.

Q. What was the size of those tanks? Do you recall?

A. I believe there were two or three 37500s and the others were around 55000-barrel tanks. There were six altogether.

Q. Did Mr. McGahan have an inventory of the equipment and facilities to be sold?

A. I didn't see any.

Q. He didn't show you any? A. No.

Q. What else occurred in that conversation?

A. That is all I remember pertaining to this.

Q. What occurred next? Did you then make a trip up to Casmite and inspect the property?

A. What occurred next is I called on Mr. Ferer and asked Mr. Ferer if he would be interested in going in on that deal, and he said yes, he would be interested and he would like to look into it. So I made an appointment and we jointly went up to Santa Maria or, rather, to Casmalia and [22] looked over the holdings there.

Q. Any examination that you made of the property before that time was not for the purpose of purchasing or for making a bid on this particular transaction, is that correct?

(Deposition of T. H. Clements.)

A. Oh, yes; I did. In other words, as a matter of fact, I had been trying at various times to buy a lot of the material and equipment out of that property from the Richfield. I made several stabs at that.

Q. Had you ever bought any?

A. Not at that location but—

Q. I mean at that location.                      A. No.

Q. At this examination that you made with Mr. Ferer, who were present?

A. Just Mr. Ferer and myself.

Q. Just the two of you?                      A. Yes, sir.

Q. When did that occur?

A. Oh, I would fix the time about the middle of December of 1940, in that neighborhood. I may be off on the dates, but, as I recall, it was the early part of December or somewhere in there.

Q. Did any Richfield employee inspect the property with you?                      A. No. [23]

Q. The two of you walked over the property alone?

A. That is right.

Q. What did you examine and how extensive was your examination?

A. We spent practically a whole day there looking it over.

Q. The land covers about how much space?

A. It is about a mile one way and a mile and a half the other.

(Deposition of T. H. Clements.)

Q. Will you describe the examination that you made? What did you do?

A. I forgot to mention that Mr. McGahan had told me that there was a map of the whole property there at the caretaker's house. So, when Mr. Ferer and I went up there that day, we went up to the house and asked for and obtained this map.

Q. Do you know the name of the man with whom you talked?

A. He is that fellow that has been up there and is still there.

Q. Was it Mr. Duncan?

A. That is right, Duncan.

Q. Did he go over the property with you?

A. Only in this respect, that he went with us over to the refinery site across the canyon and opened up some boiler houses and some locked-up buildings like the compressor [24] building and the warehouse and the enclosure underneath the condenser boxes. I believe they were padlocked at the time.

Q. Then did he stay with you during the balance of your examination? A. No.

Q. He left? A. Yes.

Q. Did you examine the various tanks?

A. Yes; during the day's period we examined practically everything we could catch up with.

Q. What was the purpose of your examination?

(Deposition of T. H. Clements.)

A. To arrive at an estimate of how much we would offer.

Q. What were you interested particularly in?

A. In any and everything.

Q. Did you make any estimate of the tonnage of the material to be removed?

A. Yes; we made an estimate. I think we broke it down into steel plate and into pipe and scrap and the buildings.

Q. What was your estimate of the tonnage of metal to be taken off of the property?

A. I forget right now. I couldn't answer you on that.

Q. Did you make any memorandum of that?

A. We scribbled it down at the time but I didn't retain any copy of it. I don't know whether Mr. Ferer did [25] or not.

Q. How did you go about it? Would you look at a tank and estimate the tonnage involved in that tank?

A. That is right.

Q. And in the stills?                      A. Yes; that is right.

Q. And in the boilers and engines?

A. Yes; that is correct.

Q. Do you have any recollection at all of the tonnage that you estimated?

A. I can't remember it now.

Q. Do you have any recollection within any limits of a minimum or a maximum?



(Deposition of T. H. Clements.)

A. No, because we were breaking it down at the time, as I say, into pipe and plate and various items and we were setting up different valuations for different commodities.

Q. You mean you were not valuing all of the material at the same price? A. Oh, no.

Q. What value were you placing on the steel plate?

A. As I recall, we figured the steel plate in place there worth around \$15 a ton as I remember.

Q. How much? A. \$15 a ton.

Q. And what was the source of that steel plate? Where would you get that steel plate from? Perhaps my question isn't clear. What equipment on the property would [26] be that steel plate?

A. Condenser boxes, steel walkways, jacketing around the pipe stills and, as I recall, we also included in the steel plate figure the shells of the boilers which we did not figure would be usable as boilers and we considered the tubes in the boilers as pipe.

Q. What was the quantity of steel plate? Or does that include all the types of steel plate you were figuring on? A. Yes.

Q. What was the approximate quantity of that that you estimated?

A. I have forgotten. I can't give it to you exactly.

Q. That was your purpose in making the examination, wasn't it, to make an estimate?

A. Yes. We made it at the time but I don't retain that figure now.

(Deposition of T. H. Clements.)

Q. That was an important feature to you, wasn't it?

Mr. Krasne: Just a minute. I object to that on the ground it is argumentative. The witness has answered that he doesn't remember.

Q. By Mr. Paradise: Do you recall the over-all tonnage that you estimated? I am not asking you to make a calculation now based upon anything since the things were removed but what your recollection is of the estimate that you made at that time. [27]

A. As I recall, we made an over-all tonnage estimate out there of around 6,000 tons.

Q. 6,000 tons?

A. Something of that type, six or seven thousand; and I think we even went so far as to get a rail rate from the railroad based on that probable tonnage.

Mr. Krasne: Is that tonnage of everything?

A. I am assuming that included everything, from the context of his question.

Q. By Mr. Paradise: I am referring, Mr. Clements, to the tonnage of the material other than wood that you would take off.      A. Yes.

Q. I didn't intend that you include in that any of these buildings.

A. No. I didn't include that. In other words, I was figuring on materials that would have to be hauled in to Los Angeles, in the way of pipe and steel and materials like that.

Q. Metal material?      A. Metal material.

(Deposition of T. H. Clements.)

Q. That you were taking out for salvage purposes?

A. That is right.

Q. And you figured that at 6,000 tons?

A. Something like that.

Q. You say you made an inquiry of the railroad company [28] for the purpose of getting railroad rates. Do you have correspondence with the railroad company on that?

A. I didn't handle that correspondence. Mr. Ferer did.

Q. What were the other items besides the steel plate that you were examining for the purpose of estimating tonnage? Or, by the way, before you answer that question, did you use other factors in determining your estimate other than tonnage or was tonnage the sole factor you were interested in?

A. In the salvage business we reduce practically everything back to a tonnage figure.

Q. Now will you answer the preceding question as to what other items you were examining other than the steel plate?

A. We examined, for instance, the scrap, the scrap cable, and the buildings and pipe lines.

Q. Before you get to the buildings, will you describe the scrap and scrap cable? Where was it?

A. There was steel scrap over the premises but there was steel cable, a mountain of that, laying along the main creek bed there, about 10 feet high.

(Deposition of T. H. Clements.)

Q. How much did you estimate in tons was the quantity of steel in that scrap pile you mentioned?

A. I have forgotten. Then we checked over the various boiler houses. There were six or seven boiler buildings [29] scattered over the premises and we checked the pipe in the condenser boxes and the pipe stills. We checked over the various wells on the property and estimated the probable pipe we could remove in the salvage of those wells. We checked over even the scrap which could be removed in the form of revetements and retaining walls and we estimated the value of the storage tanks.

Q. When you say value, are you talking now about money or tonnage?

A. Those tanks we didn't consider in the form of tonnage because you couldn't cut them up and remove them to Los Angeles because most of them were corrugated. We were considering what we might be able to sell them for locally. And we were also trying to take into consideration the value of any oil in those tanks. We checked over the various pipe lines over the property and tried to figure out the sizes and the tonnage of that pipe.

Q. What was the length of those lines?

A. There were lines running every conceivable direction across the property. So that is a pretty difficult question to answer.

Q. From the map that you had, did you estimate the distance in feet or in miles of the various lines?

A. Yes; that is right, and we just converted them over into tonnage.

(Deposition of T. H. Clements.)

Q. Do you recall the distance of those lines? [30]

A. I don't recall. In other words, I know there were some lines there, just scores and scores of lines, which would run three and four thousand feet in length.

Q. How would you estimate the tonnage in those lines?

A. By checking the size of the line and its probable weight per foot.

Q. What size were the lines?

A. There was more 4-inch lines than any other size, and those 4-inch lines, instead of being standard line pipe, were mostly bastard oversize lines, 5 inches or something like that.

Q. There were some large lines on the property, large pipe lines, that also had a steam line in connection with them, were there not?

A. Practically every line on the property had what we call a gut line through it by which the oil could be handled and moved, and the size of the gut line depended on the size of the outer pipe. There were a lot of lines 8 and some even 10 inches in size which had 2-inch gut lines in them and the 4-inch lines mostly had 1-inch gut lines and then the smaller lines had half-inch gut lines as I remember.

Q. What estimate of the tonnage of the pipe lines did you consider?      A. What was that question?

Q. I say what did you estimate to be the tonnage of the pipe lines? [31]

(Deposition of T. H. Clements.)

A. Oh, I have forgotten. We pooled the whole thing together. In this estimate we were also including the flues from the boilers, for instance.

Q. Did you put a different valuation on those pipe lines than you did on the steel plate, from a valuation standpoint?

A. I have forgotten what base figure we set on them now.

Q. Was steel plate more or less valuable than those pipe lines?

A. It seems to me that the plate was at a little better premium than the pipe line, although I won't take oath to it now because market conditions have changed.

Q. You mentioned that your over-all estimate of the amount of tonnage was 6,000 tons, is that correct?

A. I may be wrong in that but that is just my remembrance of it, although I may be wrong.

Q. Is that your best recollection of the over-all tonnage?

A. That is my estimate or that is my remembrance of it.

Q. What proportion or what fraction of that represented the pipe lines?

A. I wouldn't know. I can't answer you on that.

Q. Was it a third or a half? Do you recall what fraction? [32]

A. I wouldn't even venture an estimate.

Q. Did you make any written notes at the time?

(Deposition of T. H. Clements.)

A. We scribbled on some scratch paper at the time but I didn't retain any written memorandum of it.

Q. You have no recollection at all of the tonnages, within reasonable margins, of what you estimated at that time? A. No.

(Short recess.)

Q. When you mentioned this scrap pile, I think you also said something about other loose metal on the property. Will you describe that, Mr. Clements?

A. Well, when we made up our estimate, of course, we figured two extremes, our minimum recovery of metal and our maximum.

Q. What were those extremes?

A. As I recall, we figured that possibly we wouldn't get over a minimum of 3,000 or 3,500 tons of metal and our top figure would be about 6,000 as I remember. And that would be the same thing when we would estimate some of the pipe. For instance, on a pipe line, some of that pipe would have to go into scrap and not into usable merchandise.

Q. Do you mean when you arrived at your minimum estimate of 3,500 tons you broke that down between scrap and stuff that was salable in that form? Is that what you mean? [33]

A. Yes. And then, another thing, some of it was indefinite. When we figured the pipe in those wells, we figured under any condition we could get 50,000 feet and possibly we could get 100,000 feet. A thing like that is indefinite as to what you run into when you start

(Deposition of T. H. Clements.)

to pull those wells. And the same thing on those pipe lines; on some of the lines we figured they would have to be cut up into scrap because of the soil corrosion. As a matter of fact, a lot of the lines we cut up into scrap. They were useless as pipe.

Q. How did you tie that into your figure of 3,500 tons?

A. A certain proportion of our whole figure would be scrap and a certain part of it usable. You were asking that question as to what was our tonnage of all types and descriptions. When we figured it there on the cuff, we were allowing different price schedules for different items.

Q. I am talking now about tonnage only. The 3,500 tons you mentioned as a minimum included both the scrap and the other equipment that you were taking off, that was salable as such?

A. Yes; in other words, all metal.

Q. Getting back to the scrap, you mentioned this mountain of steel lines.

A. No. That was old cable-tool drilling cable.

Q. Cable? [34]

A. Mostly. For instance, on an item like that we didn't know whether to value it for much of anything or not. It was pretty rusty. And, as I recall, that is one of the things we figured we might haul out of there and yet we wouldn't dare put any valuation on it in dollars and cents at all. And, as a matter of fact, we got into a lot of grief after we cut it up.



(Deposition of T. H. Clements.)

Mr. Paradise: I move to strike that part as being non-responsive to the question, the latter part.

Q. What tonnage did you figure there was in that pile of wire line? A. I have forgotten.

Q. You have no recollection whatsoever?

A. No.

Q. You wouldn't state any figure? A. No.

Q. Was there loose metal around the refinery?

A. There was a lot of scrap pipe, you might term it, and then up over the lease, scattered around where the derricks had stood, there was lots of loose cable and scrap pipe around those locations.

Q. Were there any loose corrugated iron sheets or drilling bits scattered around the property? Do you recall that?

A. No. All the drilling bits had been removed. In the blacksmith shop down below there was a lot of old cable [35] tool jars, as a matter of fact, and I think there were one or two bits, but the amount was negligible of the bits. There was no loose galvanized iron. All of these buildings were galvanized and wood structures but we didn't figure the galvanized material as loose galvanized at the time because we figured we would sell them as buildings at the time, which we largely did.

Q. Calling your attention to the refinery itself and the items of the stills and boilers and other equipment around the refinery, you mentioned that some of those properties were excluded from the sale. Do you recall that?

(Deposition of T. H. Clements.)

A. Yes; the barrel stills largely were excluded. There were either two or three shells, which had formerly been used as stills and had been lifted out of the settings and were laying there loose in cradles in the same battery, which were not excluded but the stills themselves had been previously sold to the O. C. Fields Gasoline Corporation.

Q. You expected to get under this sale, did you not, the supports for those stills that were excluded from the sale?

A. Yes. As a matter of fact, in discussions with Mr. Harold Davis, the 8-inch buck stays, you might say, of those steel settings were definitely included in our transaction. And, as a matter of fact, it was stipulated that—

Q. To what are you referring? Is it a specific conversation with Mr. Davis? [36] A. Yes.

Q. When did that occur? A. For instance, it occurred the last time in your presence, when we were sitting at this desk. And we asked specifically where O. C. Fields' line stopped and started, whether they took the lines from the stills over to the condenser boxes, and the answer was that the O. C. Fields purchase stopped at the first flange connected to the still and everything outside of the flange in the stills was to be our property, and that included not only the vapor lines to the condenser boxes but the fuel oil lines, the charging lines, the transfer lines and all of that type of merchandise.

Q. Were there some overhead lines also there?

(Deposition of T. H. Clements.)

A. There was a vapor overhead line also there and there was some steam smothering lines which were excluded from the O. C. Fields purchase.

Q. Those items which you have just mentioned are all items that are not included in the description of boilers, pumps or engines, is that correct?

A. No. Well, will you reask that question so I can answer it a little bit more intelligently?

Mr. Krasne: I object to that on the ground it is incompetent, irrelevant and immaterial and the answers reconciled with the phrases that counsel refers to will speak for themselves.

Q. By Mr. Paradise: Will you answer the question? [37]

Mr. Krasne: If you understand it.

A. I really don't understand the question. In other words, it was stated and mutually agreed that—

Q. By Mr. Paradise: Are you talking about a conversation now?

A. We are speaking about that conversation that took place at this desk, the last conversation we had, where we wanted to have definitely stipulated what O. C. Fields took out of that still battery.

Q. Perhaps you don't understand my question. Referring to these additional overhead lines and supports for the stills, are those boilers? A. No. It is pipe.

Q. Is it a pipe line? A. Well, the vapor overhead lines were 40 to 45 feet in length. I don't think that would constitute a pipe line particularly. Of course, the

(Deposition of T. H. Clements.)

charging lines underneath ran probably 80 feet over to a charging pump and then their sections ran down the valley maybe 1,000 feet to a crude storage tank. So from that pump down to the tank you would call that a pipe line but you wouldn't hardly call the short pipe between the pump and the still a pipe line. You would call them in normal oil field language charging lines or transfer lines.

Q. The steel supports for these various stills—I will strike that out. I think you mentioned that Mr. Fields' [38] company, the Casmite Company, was purchasing certain of those stills, is that correct?

A. They bought all stills.

Q. And those stills were cut off at a certain point and you were to have all of the supports around it, is that correct?      A. Yes.

Q. All of that still that you were to get, that was not to be a part of the stills that Mr. Fields was taking, would not be classified as pipe line, would it?

A. I want to clarify one point there. You used the word supports. Those stills rested primarily on a big rack and the work around that was in the form of buckstays to keep the brickwork from shoving apart.

Q. That may be the technical term but will you describe what you mean by a buckstay?

A. They were largely 8-inch channel and I-beams which stood up and down in the brickwork, and there were  $\frac{3}{4}$  and 1-inch rods that ran through this stiffener member and through the brickwork and a similar member on the other side of the brick setting which prevented the

(Deposition of T. H. Clements.)

crumbling apart of the stills. As I recall, none of these stills were what we call hung supports like you often do find in some construction. As I remember, these stills were all supported on the brickwork primarily itself. They were not slung members or slung tankage. [39]

Q. You expected to get all of that additional still as a part of this transaction, is that correct?

A. We not only expected to but we did.

Q. You mentioned that you made an estimate of the recoverable tonnage of casing from those wells. What was that estimate?

A. We figured we could get between a minimum of 50,000 feet of pipe up to 100,000 feet of pipe.

Q. What was the tonnage of that? Can your translate that into tons?

A. The vast majority of that was 10-inch pipe and the record showed that it averaged 40 pounds a foot.

Q. What records are you talking about?

A. The drilling logs.

Q. Those are the drilling logs that you examined after this contract was signed, is that correct?

A. Yes.

Q. You didn't have those before you at the time you were making this estimate?

A. You could see the pipe coming out of the well and we figured—

Q. Just a moment. You didn't answer the last question.  
A. Will you read that question?

(Deposition of T. H. Clements.)

(Question read by notary.)

A. It wasn't necessary. [40]

Q. Will you answer the question? Did you or did you not?      A. No.

Mr. Krasne: You may answer the question and then, if you have any explanation for the purpose of the record, you may make it.

A. It was unnecessary because I had previously seen the logs and, furthermore, I had seen the wells drilled and I knew what pipe in general had gone into the wells.

Q. By Mr. Paradise: The last time you had seen those logs was how long before that time?

A. Oh, a matter of four or five years.

Q. Did you know what had occurred to the wells subsequent to that time?

A. You asked that question before and you struck it out because it was hearsay.

Q. I don't want to inquire as to what you heard. I want to know what you saw.

A. I hadn't seen anything done to the wells in the way of pipe removal.

Mr. Krasne: Just a moment. Let's have counsel's previous question, please, and I think you can answer it.

(Previous question read by notary.)

Mr. Krasne: If you can state what happened, you may answer the question.

A. I had seen the derricks had been removed and the [41] draw works had been removed and the engine

(Deposition of T. H. Clements.)

had been removed and all of the drilling equipment and you could see that the production piping had been removed.

Q. By Mr. Paradise: You are talking about what you could see when you examined the property?

A. Yes.

Q. Did you count the wells on the property?

A. Well, we didn't go to every one and count them but we checked the blueprint and counted them and we verified their existence by walking over a large majority of them.

Q. What blueprint are you talking about?

A. The blueprint in the possession of Mr. Duncan there.

Q. That was the map that Mr. Duncan gave you?

A. Yes.

Q. I think you stated that when you looked at the wells there was a short piece of pipe coming out of the surface and it was capped on top, is that correct?

A. That is correct.

Q. From looking at that, could you tell the casing program in that well, how much casing there was in it?

A. What do you mean by the word program?

Q. Well, how much casing was installed in that well and was there at that time?

A. On these stubs that came up, there were in several cases gas lines still coming up and connected to those casings, which showed that the wells were not dead and were [42] still alive.

(Deposition of T. H. Clements.)

Q. How many would you say there were of such wells with gas lines attached to them?

A. In one location there, there were 8 or 10.

Q. 8 or 10 wells?            A. Yes.

Q. Were there more than that in other locations?

A. A lot of the other locations where we went around and checked you could see gas bubbling out. In some of the casing, as a matter of fact, there were places where there was some oil coming out.

Q. Coming out of the stub of the pipe that was capped?

A. Yes. In other words, you could see little gas bubbles coming out of a lot of pipe, which would indicate they were still open holes and had not been cemented off.

Q. Where were the bubbles coming from? Were they coming from the joint on the cap?            A. Yes.

Q. And there was oil dripping from them?

A. You could see it coming out through that heavy tar. On some wells, where there was a little seepage around the casing going over to sumps, you could see where it was flowing a little bit, where it was coming up around the casing and wasn't a perfect shut-off.

Q. You say you estimated that there was a minimum of 50,000 feet to be recovered and a maximum of around 100,000 [43] feet?

A. That is right, of average 10-inch pipe.

Q. Of 10-inch pipe?            A. Yes.



(Deposition of T. H. Clements.)

Q. How did you determine the size of the pipe?

A. From experience primarily but then most of the stubs which we were looking at were 12- and 14-inch pipe, which meant that the string going down was either 10- or 11-inch pipe.

Q. You are referring to two sizes of strings?

A. One is the surface string, which is the largest string, and the other is the inside string, which is smaller. These surface strings averaged 12 and 14 inches, or I suppose, technically, they are  $12\frac{5}{8}$  and various figures.

Q. And from that you guessed that there was an inside string of a smaller diameter, is that correct?

A. I not only guessed it but I practically knew it.

Q. How did you know it?

A. From past experience.

Q. Do you mean an examination of those particular wells? A. Yes. And I knew of other wells, too.

Q. Would an examination of another well show you what was in those wells?

A. Experience would tell you.

Q. Well, did you know what was in these wells? [44]

A. I said that previously I had heard in Santa Maria that the production string had been removed and that is all that had ever been done to the wells.

Q. What do you refer to as the production string?

A. Generally, it consists of a 3-inch pipe going down into the formation, at the bottom of which there is a pumping barrel, and there is a sucker rod which comes up the center of that, which comes up and down and pumps the oil to the surface.

(Deposition of T. H. Clements.)

Q. Is that what is commonly referred to in the oil industry as tubing?

A. That is right. It is known as a production tubing or a production string or production pipe.

Q. That tubing or, as you call it, production string wasn't cemented in the well, was it?

A. No. It was loose. No; that is not general practice. It used to be cemented but it had to be removed too often.

Q. On what basis did you estimate that there were 50,000 feet of recoverable—I will withdraw that. What do you refer to as recoverable casing?

A. The amount you can get out of the well and still comply with your abandonment program as set forth by your State Bureau of Mines, their rules and regulations.

Q. Do you mean by that that you cannot take out all of the pipe that is put into a hole? [45]

A. Oh, no. You can only take out that which is, you might say, excess above that which is necessary to seal off encroaching waters or oil seepages from one strata to another.

Q. How much pipe must you leave in a hole when you recover part of a casing?

A. Enough to prevent leakage into the well from one strata to another.

Q. It is necessary, is it not, to leave the well completely cased with pipe?

A. Pipe; yes; pipe and cement. And the bottom zone, where it is open hole, as it often is, has to be cemented off as well.

(Deposition of T. H. Clements.)

Q. With cement? A. With cement.

Q. When you talk, then, about recoverable casing, you mean the quantity that you can take out over and above the quantity that the mining division of the Bureau of Oil and Gas requires to be left in there, is that correct?

A. That is correct.

Q. That is the quantity you are talking about when you say a minimum of 50,000 feet and a maximum of 100,000 feet? A. That is right.

Q. How did you arrive at those two estimates?

A. Well, about a year previous to that, on the other side of this arroya or stream, I had seen some wells pulled [46] there by O. C. Fields, which they had purchased from the Associated Oil Company. They were offset wells to a lot of these wells in question.

Q. How far away from these wells were they?

A. Oh, some of them were only 75 and 100 feet.

Q. From these wells?

A. Yes. I am guessing at it. They were what we call offset wells down a common boundary line there and it was general practice in those days to set those offset wells pretty close together. And I had seen some of the pipe removed from those O. C. Fields wells.

Q. Then you estimated the quantity at that time?

A. I inquired how much they were getting out of those holes.

Q. When you talk about those offset wells, is it not correct that only certain wells on the O. C. Fields property were close to the line wells on the Richfield property?

(Deposition of T. H. Clements.)

A. They were offset adjacent wells.

Q. How many wells were you figuring on on the Richfield property?

A. I have forgotten the exact number. It was up around 60 or 67 or something like that as I remember.

Q. That was the number you counted on the map?

A. Yes; that is right.

Q. Did you know at that time that there were only 35 wells on the Richfield property? [47]

A. When you say property, that Richfield layout there covered three properties.

Q. Is the map that you were looking at the same map that is attached to the contract that was signed between Richfield and Aaron Ferer & Sons?

A. That is right.

Q. Before you leave that point, I would like to get that map. Mr. Clements, will you step over here and look at this map? This is a map entitled "Map of Soladino Lease, showing equipment, Casmalia Field", and it is attached as Exhibit A to the contract between Aaron Ferer & Sons and Richfield Oil Corporation, dated January 17, 1941. Is this the map or is this a copy of the same map that you and Mr. Ferer were using at that examination?

A. That is right. The only thing is, when we examined this map, we found that there were a lot of wells on that property which didn't appear on this map. That is the reason we didn't know just how to figure it. Later, when we got these other blueprints,—for instance, as you come in this gate, here is the first thing—

(Deposition of T. H. Clements.)

Q. "That" doesn't mean anything in the record. Will you identify it by location?

A. Well, for instance, we first came in across this bridge, at the main entrance there.

Q. At what corner of the property is that by directions? [48]

A. It is almost diametrically in front of this bridge. That is the southwest corner of the property that you really enter. This is north. For instance, when you come into this property directly around this road right in here, there is an old well which is stubbed up and doesn't appear on this map at all. As a matter of fact, when we went back and checked the records later, we found another map which showed these wells in this zone in here which don't even appear on this map. In other words, we couldn't determine just how many wells there were because they were not all on this blueprint or map.

Q. Did you inquire of anyone as to the number of wells? A. No.

Q. You were unable to determine from the map but you made no inquiry, is that correct?

A. That is correct.

Q. Is it not a fact that the map you were looking at covered several other parcels of property in addition to the one parcel of property shown on this map?

A. Which blueprint is that? Do you mean this map here?

(Deposition of T. H. Clements.)

Q. I will ask you again if the map that you were using at the time you inspected the property, which Mr. Duncan gave you, did not cover several additional parcels of property over and above the one parcel of property that is shown on this map that is attached to the contract.

A. As I remember it, it was this same map, although I [49] may be wrong.

Q. Will you look at the boundaries of this property and tell me if your answer is the same?

A. That is a year and some fraction ago since that occurred but, as I remember, the blueprint we looked at did not cover adjacent property. For instance, I know it didn't cover the loading rack which was down beyond the Black plant and it didn't show the O. C. Fields property.

Q. I believe that this parcel of property shown on this map, Mr. Clements, covers approximately 400 acres, is that correct?

A. I never figured the acreage. So I can't answer it.

Q. You say the map that you saw showed approximately how many wells?

A. I think that we arrived at it would be around 60 or 65 wells that we could work on or something of that sort.

Q. Did you ask Mr. Duncan for that map?

A. When we went into the property that morning; yes. We went up to the house and asked for the use of the map, as instructed by Mr. McGahan.

Q. You asked for what map? Do you recall your conversation with Mr. Duncan?

(Deposition of T. H. Clements.)

A. No. We just merely asked for the Richfield property map there.

Q. Did you identify the particular parcel of property you were interested in of the various parcels that Richfield [50] owned up there?

A. I don't believe I understand the context of that question.

Mr. Paradise: Will you read it?

(Question read by notary.)

Mr. Paradise: Will you strike the question and I will reframe it?

Q. Did you tell Mr. Duncan which particular parcel of property of the various parcels that Richfield owned, which particular one of those, you were interested in?

A. We didn't discuss anything about the property with Mr. Duncan.

Q. You just asked him for a map, is that correct?

A. Yes, sir.

Q. Will you point out one further thing on this map to me, Mr. Clements? In what portion of this parcel of property that is shown on this map is the refinery property, that is to say, the refinery operations?

A. The refinery operations extended along the southern section of the enclosed property.

Q. Are there any wells in that portion of the property? A. Oh, yes.

Q. There are? A. Yes.

Q. Will you point them out? [51]

(Deposition of T. H. Clements.)

A. Here is one, for instance, right above the refinery proper.

Q. That is in which corner of the property?

A. It is in the extreme southeasterly corner.

Q. Are there any other wells at the refinery end of the property, on the southern end of that property?

A. May I have the question again, please?

(Question read by notary.)

A. How far from the boundary line do you mean by that question?

Q. There is a ditch that runs through the property which separates the refinery portion of the property from the producing end of the property, the oil well producing end, isn't that correct?

A. That is true. This is it here.

Q. This direction is south, isn't it? A. Yes.

Q. South of that ditch there are no other wells, are there, in connection with the refinery?

A. Other than this one?

Q. Yes.

A. I believe that is the only one we saw capped.

Q. All of the oil wells, other than that one, are in the northerly part of this parcel, isn't that correct?

A. Yes, as far as this map shows but there are other wells on the south part of the property.

Q. Where were those 60 wells you mentioned? [52]

A. Scattered over the whole property.

Q. Scattered over the whole property? A. Yes.



(Deposition of T. H. Clements.)

Q. That is shown on this map that is attached to the contract? A. That is right.

Q. By examining this map, can you identify the boundaries of the property?

A. It is marked in heavy lining and it would be pretty easy to identify it.

Q. I mean by looking at the map can you tell approximately where that comes on the land, that is, the boundaries that are shown on this map?

A. The land up there has a big wire fence around it and it wasn't any trouble to tell the boundaries of the property.

Q. Did you ever attempt to compare that wire fence with the boundaries shown on this map?

A. No. There is one place down in this corner where, after we were under way, we found this wire fence had shifted somewhat over onto the Morganti property and, as a matter of fact, we removed some scrap metal from that corner which later we had to replace because it was on Morganti's property.

Q. I don't mean to mislead you at all about this or to be obscure in the question but is it not correct that the [53] number of 60 or 65 wells that I think you mentioned were wells on property in addition to the property that is shown on this map?

A. No. We figured those inside of the boundary lines of that fence.

Q. A fence running along which boundary of the property? A. As shown by this map.

Q. As shown by this map? A. Yes.

(Deposition of T. H. Clements.)

Q. Did you take this map out and compare it with the fence, that is to say, do you know that that fence was—

A. Well, it is approximately correct.

Q. You are talking about the fence along the west boundary of the property?

A. I am speaking of all four boundaries.

Q. And you compared those with the map and identified them as being the boundaries shown on this map?

A. Approximately.

Q. When did you do that? Was it before or after the contract was signed on January 17, 1941?

A. In the early part of December, I went up to the property with Mr. Ferer and we went over it with the map.

Q. The map that you are talking about, that you used for comparison purposes, was the map that Mr. Duncan furnished you, is that correct? [54]

A. That is right.

Q. Did you ever compare it with this map that is attached to the contract?

A. I never had occasion to ask for the map from Mr. Duncan afterwards.

Q. I am afraid I didn't understand that.

A. We returned the map to Mr. Duncan and we never had occasion to ask for it after that time.

Q. You just used the map that first day?

A. That one and only day.

Q. And that day is the day you identified the boundaries with the fence?

A. Yes.

(Deposition of T. H. Clements.)

Q. Did you examine this map at the time this contract was signed to see if this was the same map and the same boundaries that were shown on the map that Mr. Duncan gave you?

A. I compared that map when we got it with the boundaries which were marked by those fences.

Q. That is the map you asked Mr. Duncan for that you are talking about?

A. No. When you supplied that map with your contract and brought it out, I compared it in my mind's eye with the property as we saw it inside of those fence boundaries.

Q. Did any Richfield representative or employee tell you that this map was the same map as the one that Mr. Duncan [55] showed you?

A. No. It was never discussed.

Q. You examined it yourself and formed your own conclusions, is that correct? A. That is right.

Q. How much recoverable casing per well did you estimate?

A. Well, we figured a minimum of 1,000 feet per well.

Q. How much?

A. A minimum of 1,000 feet per well. That is the reason we said, "Well, we can get at least 50,000 feet."

Q. 1,000 feet per well? A. Minimum; yes.

Q. And you figured on how many wells?

A. We figured a minimum of 50 wells but we said, "Well, there are probably 60 or 65. We don't know just how many."

(Deposition of T. H. Clements.)

Q. When you say a minimum of 50 wells, why did you fix that as a minimum if the map showed something over 60?

A. Well, because we figured some of those wells appearing on the map, which wasn't very apparent, might have been cemented off so you couldn't get anything out of them and we didn't know their status.

Q. There were certain wells that you didn't know the status of, is that correct?

A. It wasn't very apparent on looking at them. [56]

Q. Could you tell the status of any of the wells from looking at them?

A. Why, sure. If you get gas off of a well, you know the well isn't dead.

Q. You say certain of the wells had gas seepages from the caps?

A. Yes. And, not only that, there were open gas lines coming off of a portion of them.

Q. Are those the wells that you figured were a minimum of 50 wells, the wells in which you saw gas seepages and wells that were connected to gas lines?

A. There were not that many connected to gas lines because the ones on the north end of the property were not connected. But, just glancing at them, we figured they were still live wells.

Q. How many live wells did you see?

A. I said that we guessed, and that was a guess, that there was in excess of 50, 50 minimum; that that would be the very basic minimum.

(Deposition of T. H. Clements.)

Q. When you are talking about 50, do I understand you saw 50 wells there from which there were gas seepages and to which gas lines were connected and which you, therefore, knew or surmised were live wells?

A. In the time that we took for this survey, which constituted one day, we didn't have time to go over and examine every well. [57]

Q. How many of those wells did you say you didn't know the status of and that might have been cemented off and that you couldn't recover any casing from?

A. The wells which appeared on the blueprint which we were looking at, which were surplus over and above that. We figured those were wells that were there possibly before the Doheny people had started drilling and might have been abandoned.

Q. I thought you said that blueprint you were looking at showed some 60 or more wells?

A. I don't remember how many wells appeared on that map. We did count some wells which did not appear on the map and we guessed from observation that there was at least 60 wells to be pulled.

Q. Did you know or could you tell from looking at those wells that there were any of those wells which had no recoverable casing, that is to say, casing that could be removed?

A. That was part of the gamble. When you go into a deal like this, you are gambling. You don't know everything you are going to get out of a property. You are gambling. And we guessed a minimum of 50 wells we could pull and we guessed a minimum of 50,000 feet and a maximum of 100,000 feet. We gambled or guessed that.

(Deposition of T. H. Clements.)

Q. You guessed at the number of wells and guessed at the amount of casing you could take out, is that correct? [58]

A. That is correct. We didn't have time to go over and mark and check every one with the blueprint. We were guessing.

Q. What was the tonnage of the recoverable casing that you estimated between the limits of 50,000 feet and 100,000 feet?

A. We based it on an average of 10-inch pipe and that pipe would run approximately 40 pounds a foot in those days. That was a rather light weight 10-inch pipe. And, if you took 50,000 feet out, it would be simple mathematics that it would be 50,000 times 40 minimum.

Q. That would be a minimum of 1,000 tons, would it not?

A. That is right.

Q. And a maximum of 2,000 tons?

A. That is right.

Q. Did you inquire of Mr. Duncan how many wells there were?

A. No.

Q. Did you inquire of any other Richfield employee how many there were?

A. No.

Q. Did you inquire of any Richfield employee or representative how much recoverable casing there would be?

A. I never discussed it with anyone.

Q. Did you ask any Richfield employee or representative [59] as to the casing that was in any of those wells?

A. No.

(Deposition of T. H. Clements.)

Q. Did you inquire as to the quantity of recoverable casing that could be taken out?

A. The same answer.

Q. The casing of the wells was—or your estimate of the recoverable casing in the wells ran from 1,000 to 2,000 tons, is that correct? A. That is right.

Q. Or approximately one-third of the estimated recovery? I believe you stated that you estimated a minimum of 3,500 tons and a maximum of 6,000 tons as the over-all tonnage of all the equipment, is that correct?

A. Something like that.

Q. So that this estimate of yours of 1,000 to 2,000 tons of recoverable casing was something over one-third of the quantity you expected to get of the entire equipment?

A. Yes; it would be between a half and a third of the total tonnage of everything.

Q. You say you made no inquiry of any Richfield employee or representative concerning the casing in the wells? A. No.

Q. Or any of the Richfield executives? A. No.

Q. I think you stated that the way you determined that wells had not theretofore been abandoned was by the fact [60] that you could see seepages, gas seepages, and oil seepages, from the caps of certain of the wells, is that correct?

A. I answered that before and you had it struck out. I found out, as you do in the oil field trade, from mouth to mouth, that the production piping had been pulled and the wells had been left intact.

(Deposition of T. H. Clements.)

Q. Were you told that by any Richfield employee or representative?

A. I never saw any Richfield employees up there other than this fellow Duncan at any time.

Q. Did you inquire of Mr. McGahan or Mr. Davis?

A. I never discussed it with them.

Q. Did you have conversations with any other Richfield representative other than Mr. McGahan or Mr. Davis?

A. Relative to what?

Q. Relative to this purchase and the examination of the property.

A. Never at any time.

Q. Did either of them tell you whether or not those wells had been abandoned?

A. It was never discussed.

(By agreement between counsel for the respective parties, a recess was taken, at the hour of 12 o'clock noon, to the hour of 1:45 p. m. of the same day.) [61]

(Met pursuant to agreement, at the hour of 1:45 p. m. on the same date, at the same place, the same parties being present except Mr. Sturzenacker.)

Q. By Mr. Paradise: Referring to this information that you say you had, Mr. Clements, about the fact of the derricks being taken down and the tubing and the production strings removed, when did you get that information?

A. I think it was about in the midsummer of 1940. I know I had taken a trip through there and noticed the derricks down and I asked over in Santa Maria and had been told that Mr. Anderson over there, who calls himself the Petroleum Supply Company, had pulled out.



(Deposition of T. H. Clements.)

Q. Did you talk to Mr. Anderson? A. No, sir.

Q. Did you talk to any of Anderson's staff or employees in connection with the matter?

A. I think I talked to one of the crew who had been working there.

Q. Did he tell you what they were doing?

A. Well, at that time it was what they had done.

Q. Did he tell you what they had done?

A. Yes; he told me they had pulled the production piping out and that is about all outside of the stuff on the surface there.

Q. Did he state any reason as to why it had been done? [62] A. No.

Q. You were familiar with the condition of the property at that time just before it had been done, were you not? A. Yes; pretty much.

Q. Were those derricks in good condition?

A. Oh, no. Some of them were blown over. It was a pretty crummy looking field.

Q. Did you know anything about the condition of the tubing and the production strings in those wells just before they were taken out?

A. I talked to this fellow and I asked him how the pipe was and he said it was pretty good pipe.

Q. Was that the tubing or the casing?

A. No; the casing wasn't involved. It was the production strings.

Q. You are talking about the tubing? A. Yes.

(Deposition of T. H. Clements.)

Q. The tubing that went in the well, that was not cemented in? A. Yes.

Q. And he said what?

A. That the pipe was pretty good.

Q. How do you go about pulling that? What is the nature of that operation of pulling the production strings?

A. Well, to start with, you have to get the log and [63] then go down there and determine where you are going to cut it off, and either you go down there with a cut-off tool or most generally they just lower a slug of dynamite down there and blast it off at the point you want.

Q. Are you talking now about the casing or the tubing? A. I am talking about the casing.

Q. I am not talking about the pulling of casing in wells. What was the operation of pulling tubing in wells? How was that performed?

A. The tubing is put together around 30-foot joints and you have got a casing and what you call a tubing hook and you clamp it around right below the collar and you elevate it a certain number of feet in the air and then unscrew it and keep on unraveling it as you pull it out.

Q. When you say "clamp it", you are referring to the tubing, is that correct?

A. Yes. You clamp right below the collar so that you won't skid or slip on the pipe when you elevate it.

Q. Knowing, as you did, the condition of those derricks at that time, was it possible to pull those tubings from those derricks or was it necessary to have special rigging-up operations in order that the tubing could be pulled?

(Deposition of T. H. Clements.)

A. I assume that he used one of those portable oil field tubing pullers because the derricks were in pretty miserable shape. I don't know. I didn't see it done and I [64] really can't answer that question as to how he did. But I know they use around fields portable well pullers, they call them, to handle jobs like that.

Q. With that knowledge, Mr. Clements, did it occur to you that, if Richfield employed this man Anderson that you speak of to tear down the derricks and to pull the tubing, there was some reason why Richfield wanted to retain the casing in those wells and not have the wells abandoned or the casing pulled?

A. I never was told at any time they intended to retain the wells or the casings in the wells. The point was never raised.

Q. The information that you said you had as to the work that Anderson had done was that the casing was left in the wells, is that correct?

A. That is right.

Q. Did you have any information that the wells were not abandoned at that time by Anderson?

A. I was told that he had pulled the production strings and the surface material and that the wells otherwise were left the way they were. That is what I was told.

Q. In other words, they were not abandoned at that time?

A. That is right.

Q. Did it occur to you that there was some reason, when Mr. Anderson was employed to pull the tubing and remove [65] the derricks, that Richfield had for not having the wells abandoned or the casing removed?

(Deposition of T. H. Clements.)

A. The truth of the matter is, the way I heard it, —

Q. Can you answer the question first?

A. Yes. The way I heard it was that Anderson went in there and was grabbing the gravy train and was getting much of the material that was loose, without much labor expended, on some tonnage basis which was very advantageous.

Q. From whom did you learn that?

A. General conversation around town and around the field.

Q. From whom?

A. I can't tell you now at this distant time.

Q. Isn't it the fact, Mr. Clements, that Mr. Anderson was prevented from removing the casing, that is to say, that the transaction was limited to merely pulling the tubing and the rods that were in bad condition and removing the derricks but not to abandon the wells or to remove the casing?

A. I don't know. I didn't see the contract and never discussed it with Mr. Anderson.

Q. You knew, however, at that time the wells had not been abandoned in accordance with the requirements of the mining division, is that correct?

A. Yes; by conversation.

Q. Did you inquire of any Richfield employee or [66] representative why those wells had not been abandoned?

A. No.

Q. Do you know when Mr. Anderson's work was performed by him?

(Deposition of T. H. Clements.)

A. Not specifically on dates; just in the general period there.

Q. It was within a year prior to the time when this transaction was consummated between Richfield and Aaron Ferer & Sons, was it not?

A. Generally; yes.

Q. Knowing that that work had been done by Mr. Anderson within one year prior to the date of this transaction and that the wells had not been abandoned, and knowing further that it was an operation that required rigging up, that is, putting up a mast in order to pull the casing from those wells, didn't it occur to you that there was some reason why Richfield didn't want those wells abandoned and the casing removed, which operation could very easily have been accomplished by Mr. Anderson at that time?

A. He wouldn't use the same rigging to pull those wells.

Q. What sort of rigging do you need to pull wells?

A. Most of them today use a very heavy hydraulic well puller.

Q. All you use is a drill mast, isn't it?

A. As a rule, when the casing is stuck in the hole, [67] those drill masts are too light and won't handle it.

Q. You can't tell that until after you get in the well, isn't that true?

A. The presumption is you have to use something heavier than one of those light well-pulling outfits.

(Deposition of T. H. Clements.)

Q. Are you talking now about deep wells or wells as shallow as these wells?

A. I am speaking of any well.

Q. With that knowledge that you had at that time, Mr. Clements, did it occur to you to inquire of any Richfield representatives why those wells had not been abandoned in the past and why they were willing that the wells be abandoned at the time of your transaction?

A. The wells were never discussed by me with any Richfield employee at any time.

Q. Mr. Clements, did you participate in the determination of the sum of \$22,000 to be offered by Aaron Ferer & Sons to Richfield for the equipment and facilities which were to be sold under that contract?

A. Yes. When Mr. Ferer and I were up there, we discussed it and we had other conversations on it. And, as a matter of fact, if I remember correctly, I assisted in preparing the first letter of proposal to Richfield.

Q. How did you arrive at that amount?

A. The initial investment isn't all cost in a removal of that sort. In other words, your abandoning operations [68] cost you a considerable amount of money and we looked it over and and determined what we thought we could realize back in dollars and cents and how much we could afford to gamble on it. After all, it is a gambling operation. You can't determine specifically on a deal like that what you are going to get out. You don't know the nature of all of your underground piping and the nature of the pipe you get out of the well and you can't even tell about all of the things that you do look at, as to whether it will be merchantable merchandise or not.

(Deposition of T. H. Clements.)

Q. You went up there for the purpose of seeing how much there was and what the condition of it was, however?

A. That is right; in the early part of December.

Q. Let's take this step by step. You estimated, I think you said, that there were between 3,500 and 6,000 tons of removable metal?

A. That was our guess; yes.

Q. And that includes the recoverable casing that you estimated? A. That is right.

Q. What did you value that at and how did you arrive at the valuation?

A. Well, that casing was one of our biggest gambles. We figured, if we could get it on the Los Angeles market, we ought to realize around a dollar a foot for it.

Q. What size pipe did you say you expected to get out [69] of those wells?

A. We figured it would average 10-inch.

Q. What was the price at Los Angeles at that time for 10-inch pipe?

A. It depends on what condition the pipe is in. Just for relaying purposes, which we figured it, it was anywhere from 90 cents to about \$1.35.

Q. What kind of pipe are you talking about now?

A. This 10-inch pipe coming out of the well.

Q. Did you know what kind of pipe was in there, whether it was seamless pipe or lap-welded pipe?

A. They didn't have seamless pipe back when those wells were drilled.

(Deposition of T. H. Clements.)

Q. You knew, then, it was lap-welded pipe, didn't you?      A. Yes.

Q. And the prices that you just mentioned of 90 cents to \$1.35 per foot were for lap-welded pipe? Those were the current prices in the Los Angeles market at that time for lap-welded pipe, were they?

A. Yes; for lap-welded pipe, clean end, for relaying purposes, as for pipe line service.

Q. Did you know anything about the condition of that pipe?

A. No. That was part of the gamble.

Q. What does that 90-cent figure represent? Is that the lowest price for pipe in good condition? [70]

A. Oh, no. That is for rather miserable pipe. Good 10-inch pipe was selling for around \$1.20 to \$1.35.

Q. If the pipe were pitted by sulphur or by some other cause, what price would it bring in the Los Angeles market per foot at that time?

A. It wouldn't bring anything less than 90 cents.

Q. Do you fix 90 cents as a minimum?

A. About that; yes.

Q. Those are the figures on pipe that can be used for installation in oil wells?

A. Oh, no; for pipe line service. I didn't figure any of this pipe was suitable for going back in wells.

Q. What valuation, then, based upon those figures, did you place upon the pipe that you expected to take out, that you say you expected to take out?



(Deposition of T. H. Clements.)

A. Anywhere from \$50,000 to \$100,000 sales price. Of course, that is not all velvet. Of course, the cost of removing and transporting it to town and preparing it and so forth was an unknown quantity.

Q. What prices, excluding the casing that you mentioned—what did you figure was the value of the other equipment and facilities that you took off or that you expected to take off?

A. You are covering everything above ground there. So you are asking a pretty large question. What specific items do you mean?[71]

Q. Well, break it down as you see fit. Take the boilers, for example.

A. As I said previously, the boilers we cut the flues out of and sold the flues as pipe and the boiler shells were just so much shell or steel plate, unfortunately, rolled. We had an idea we could sell some of the boiler shells for culvert work, for instance. As a matter of fact, we sold some of the shells later to the Richfield for culverts themselves. The vast majority of the shells were loaded on cars and brought here into Los Angeles and stacked and are still in stock.

Q. You didn't answer my question, Mr. Clements. I am talking about the time when you were making your estimate as to the price you were going to bid for this property. What value did you place upon the boilers, including the shells and the flues?

Mr. Krasne: If they did that at the time.

Q. By Mr. Paradise: Did you place a value on it for your purpose?

A. Oh, yes.

(Deposition of T. H. Clements.)

Q. What value did you place on it? A. I forget.

Q. Was it a trivial value or was it important in connection with the rest of the transaction?

A. The boiler shells were rather small. In other words, I believe there were 37 or 39 boilers on the [72] property. And, in terms of tonnage, the boilers with the tubing or with the boiler flues, I should say, you couldn't figure over about four and a half tons per boiler. So, taking it in terms of total tonnage, it was small, very small.

Q. Do you recall any value that you placed upon that for the purpose of making your bid?

A. I don't remember now.

Q. What value did you place upon the pipe lines?

A. All of the pipe lines we just thought of in terms of pipe.

Q. Did you value those separately from the casing in the wells?

A. Oh, no. They were all pooled together. We considered everything that was round and anything that material could flow through as pipe and we pooled it all together and figured it all together.

Q. Then, do I understand, if you lumped them all together, that those figures that you gave me of a minimum of 50,000 feet and a maximum of 100,000 feet included all of the pipe lines running around the surface of the property?

A. No; that wasn't my remark at all. That had only to do with the pipe in the wells.

(Deposition of T. H. Clements.)

Q. How much pipe did you figure on from the wells?

A. We figured in terms of tonnage. I forget what tonnage we figured now.

Q. Was there as much tonnage in the pipe lines [73] as you expected to be able to recover of casing out of the wells?

A. I answered that this morning and I told you at that time I thought it was a ratio of between 50/50 and a third.

Q. I don't think we are talking about the same thing, Mr. Clements. I believe you stated that the estimated quantity of recoverable casing to be taken from the wells that you were talking about was from 50,000 to 100,000 feet? A. That is right.

Q. What was the estimated quantity—

A. Which was between 1,000 and 2,000 tons, if you remember I said.

Q. What was the estimated quantity of the pipe lines?

A. I have forgotten but we pooled the whole thing together and all the metal that came off of the property, as I said this morning, was between 3,500 and 6,000 tons.

Q. You have no recollection of the quantity of pipe lines that you estimated? A. No.

Q. There were several thousand feet, were there not?

A. Yes.

Q. What valuation did you place upon the pipe lines?

A. I have forgotten.

(Deposition of T. H. Clements.)

Q. Was that an important factor in the transaction, the quantity of surface pipe lines that were on there?

A. The answer to that is that practically 90 per [74] cent, 80 or 90 per cent, of the whole transaction or whole deal constituted pipe, whether the pipe came out of the well or from an underground line or from condenser boxes or from tubings in the boilers.

Q. Let me ask you this. Was there more pipe in the surface pipe lines than the quantity that you stated that you expected to take out of the wells or was there less?

A. I have forgotten.

Q. You don't recall anything about that?

A. I have forgotten the figures.

Q. Do you recall your rough approximation of it or do you recall anything about it?      A. No.

Q. We have talked about the boilers and the pipe lines and the casing in the wells. Now, what were the other major items that went to make up that estimate of yours of between 3,500 and 6,000 tons?

A. There was some scrap, as I mentioned before, and then there was steel plate, as I mentioned before.

Q. I have forgotten, Mr. Clements, whether you have stated the quantity of scrap that there was there.

A. I didn't state. I said I didn't know.

Q. Do you recall the valuations you placed upon those other two items of scrap and steel plates?

A. It was negligible because at the time we figured the trucking or, rather, the transportation into Los [75] Angeles, and the handling at both ends, and the price of the scrap market at the time was practically nothing.

(Deposition of T. H. Clements.)

Q. Were there any other items that you expected to take off and resell than the ones we have talked about?

A. We expected to take off everything on the property.

Q. Are there any other major items that occur to you on which you placed a valuation at that time?

A. No.

Q. Pooling all of those items, Mr. Clements, what was the aggregate value that you placed on everything that you expected to take including the casing in the wells?

A. Do you mean by that question sales value or purchase value?

Q. You placed a value on the recoverable casing at between 90 cents and \$1.35 per foot at Los Angeles, which I believe you said was the current market price for that pipe at that time, depending upon the condition. Now, did you value the other items in the same manner?

A. Yes; that is, the pipe we did.

Q. And what value did you arrive at?

A. We figured that we ought to get in the Los Angeles market somewhere between \$40 and \$50 a ton, delivered in Los Angeles, for pipe.

Q. For pipe?

A. Yes. In other words, that was the going current price for pipe delivered in wholesale quantities in Los Angeles if it was merchantable pipe.

Q. At \$40 to \$50 per ton for pipe, would the recoverable casing in the wells sell at this same price?

(Deposition of T. H. Clements.)

A. 40 pounds times  $2\frac{1}{2}$  cents a pound gives you \$1, doesn't, a foot?

Q. I was trying to translate it into a tonnage price as you did. A. It is the same thing.

Q. That is, the same price that you mentioned, at limits between 90 cents and \$1.35 per foot, is the same thing as saying between \$40 and \$50 per ton, is it?

A. That is right.

Q. How much in the aggregate would you say you estimated at that time you expected to get for everything that was on the property that you expected to take off?

A. I have forgotten.

Q. You mentioned that you placed a value of between \$50,000 to \$100,000 on the pipe and casing from the wells, is that correct? A. That is right.

Q. And what portion was that figure of from \$50,000 to \$100,000 of the aggregate amount at which you valued the entire quantity of facilities and equipment to be taken from the property? Was that a half or a third or what portion of the aggregate was that?

A. We mentioned it in terms of tonnage, that [78] that would be between a half and a third. But that wasn't all based on the same price structure. In other words, that 3,500 included scrap and included plate and included pipe and pumps and cast iron.

Q. If you expected to get between \$50,000 and \$100,000 for the casing and the pipe, how much did you expect to get for everything, including the casing and the pipe? What figures did you use in making your estimate?

(Deposition of T. H. Clements.)

A. I have forgotten that. I couldn't say.

Q. What did you estimate to be your costs of doing all of the work that you were required to do under the contract? Or, by the way, what did that work include?

A. That is two questions. What is the first question?

Q. The first question is what work were you required to do as a part of this transaction.

Mr. Krasne: I think the contract will speak for itself and is the best evidence, Mr. Paradise, and I object to the question.

Q. By Mr. Paradise: What work would you have to do, Mr. Clements, in dismantling the refinery equipment?

A. As a matter of fact, refinery equipment so-called is a small part of it. It constituted some brick stills and some condenser boxes setting on some concrete columns. That was the majority of the so-called refinery.

Q. How large a crew of men did you expect to [78] put upon the property? A. About 60 men.

Q. How many? A. 60.

Q. And what work were those men going to do?

A. About half of them were to open up ditches and backfill ditches after the pipe was removed and there were truckdrivers and crews to unscrew the pipe where it wasn't possible to torch it, and we had cutters there to torch what we had to torch. We also had to have crews there to clean brick and get the brick out of the way and stack that up. The removal of the brick was a big factor in the whole transaction.

(Deposition of T. H. Clements.)

Q. Did your work include the matter of removing oil from tanks?

A. No. We decided we would remove the lines first and clear the property so that that portion was out of the way; then that we would take and drain off the oil into sumps and then fire those sumps. But we were precluded from going ahead and following out that part of the program because the fire warden refused to give us firing permits starting from the mid part of the summer on. They had had one or two fires in that territory, so he clamped down and wouldn't give us permits to clean up the oil in the sumps.

Mr. Krasne: I think Mr. Paradise's question is what estimates, if any, did you make, before you went into this deal, as to what kind of labor would have to be [79] done.

Mr. Paradise: Exactly.

Q. What were your estimates of the entire cost of your operations in connection with abandoning and salvaging and moving off this equipment and cleaning up the property?

A. I have forgotten the figure now.

Q. Can you tell me what the approximate figure was?

A. I have forgotten.

Q. What factors did you use in arriving at the figure at that time?

A. We were gambling on this. We couldn't tell how much labor was going to be used in it and we were just going into it blind and hoping it wouldn't run over too much. Most of these deals are run that way. You can't sit down at a desk and figure that stuff out.



(Deposition of T. H. Clements.)

Q. Did you estimate that you were going to need about 60 men?

A. We figured we would put 60 men on and see how it worked out. We might need more and we might need less.

Q. For how long a period did you expect to use them?

A. 60 men for approximately six months.

Q. Based on those figures, did you estimate the amount of your labor costs?

A. What was a basis for the estimated cost; yes.

Q. What figure did you arrive at approximately?

A. I can work it out backwards with a pencil.

Q. I don't want any calculations that you want [80] to make now. I am asking you for the estimates you made at that time.

A. Whatever it was, it was based on that figure.

Q. Just briefly, what were your labor rates that you expected to pay at that time?

A. Anywhere from 60 cents to 80 cents an hour.

Q. What other costs did you contemplate that you would have besides labor?

A. Trucking and transportation, which would be an enormous factor.

Q. Did you make any estimate as to what that would amount to?

A. Yes; we made an estimate at that time.

Q. What was it?

(Deposition of T. H. Clements.)

A. We figured, if the worst came to the worst, we would have to pay the rail rate into Los Angeles which at that time was around, as I recall, \$4.60 a ton or \$4.80 a ton into Oakland. And we toyed with the idea of putting in or buying trucks and using our own trucking equipment to bring it down and we figured we could probably transport it for \$2.50 a ton using our own equipment. And, as a matter of fact, later on the only reason we didn't use our own equipment was that we had the rail rate reduced to \$2.40 a ton, which was comparable to the cost of our own truck operations.

Q. Mr. Clements, I tried to make clear that my [81] questions are not as to what happened afterwards but merely as to what figures and estimates and costs you were using for the purpose of your estimates that you made before this contract was made. As to those transportation costs, what did you estimate they would be in the aggregate?

A. We figured at the time there would be anywhere from 3,500 to 6,000 tons to be moved at a cost of anywhere from \$2.50 to \$4.60 a ton.

Q. What were your other items of cost besides labor and transportation?

Mr. Krasne: Do you mean, again, what other items did they guess about or estimate at that time?

Q. By Mr. Paradise: What other items did you estimate at that time? What other factors of cost were you considering in making up your estimate?

A. Trucking costs there on the job, the cost of removing the brick and certain sales costs.

(Deposition of T. H. Clements.)

Q. What was the aggregate now of all costs that you expected to be subjected to? What was your estimate of them? A. I have forgotten.

Q. You have given certain factors. You have your factor of labor and transportation and those other costs. Now, within what limits did you estimate that your aggregate costs would be?

A. I am not very good on figuring things in my [82] head without a pencil.

Q. Do you recall that you did make an estimate at that time?

A. Certainly, we did make an estimate at that time.

Q. But you have no recollection whatsoever of what it was? A. No.

Q. Can you estimate it within \$10,000? I mean can you recall within \$10,000 of what your estimate was?

A. No. I have forgotten the figures.

Q. Can you recall it within \$50,000, what your estimate was?

A. I have forgotten the figure.

Q. Did you expect to make a profit on this deal?

A. We made that assumption; yes.

Q. What was the estimated amount of profit that you were considering at the time you made this offer?

A. We thought we stood to make a minimum of \$50,000 on the transaction, \$50,000 to \$60,000.

Q. And a maximum of how much?

A. \$90,000 to \$100,000.

(Deposition of T. H. Clements.)

Q. So you figured that the amount of your recovery, that is, the proceeds that you would receive from the sale of this salvage equipment over and above your costs, would be from \$50,000 to \$100,000, is that correct?

A. Yes.

Q. The amount that you expected to receive from [83] the casing in the wells I think you also stated was between \$50,000 and \$100,000, is that correct?

A. That is right.

Q. So that that figure represents the full amount of profit that you expected to get, that is, the proceeds from the sale of the casing in the wells represents, within those margins that you specified, the full amount of profit that you expected to get on the transaction, is that right?

A. It coincides with it.

Q. But in your discussions with any Richfield representative there was no mention at any time of any of the wells or the casing in the wells, is that right?

A. That is correct.

Q. Mr. Clements, to remove casing from an oil well, is it necessary to abandon the well, do you know?

A. Yes.

Q. Did you make any estimate of the cost of the abandonment of these wells?

Mr. Krasne: Do you mean at that time?

Mr. Paradise: At that time; yes.      A. No.

Q. No estimate?

(Deposition of T. H. Clements.)

A. Oh, yes; we estimated it in our general cost set-up there. We hadn't gone ahead and gotten bids or obtained bids on doing it, though.

Q. What was your estimate of the cost of abandon- [84] ment? And when I say of abandonment, I am talking about the abandonment of the wells that you mentioned, the 60 to 65 wells that you spoke of.

A. We figured possibly we would have to put out maybe around \$30,000 or \$40,000.

Q. \$30,000 to \$40,000? A. Yes.

Q. What sort of an abandonment program were you contemplating when you made that estimate?

A. What do you mean by that question?

Q. I mean did you know in what manner you would be required to abandon those wells.

A. In general. I have seen wells abandoned before.

Q. It is necessary, is it not, to abandon a well in accordance with the requirements of the Division of Oil and Gas of the State of California? Isn't that true?

A. That is the State law.

Q. Are their requirements identical with respect to all wells? A. No.

Q. Did you know what their requirements would be with respect to these wells? A. No.

Q. Did you inquire of the Division of Oil and Gas as to what their requirements would be with respect to these wells? [85]

(Deposition of T. H. Clements.)

A. I did not. I had seen wells, on visiting there, abandoned, and I more or less could draw assumptions from that.

Q. When were those wells abandoned? How long prior to the date of this contract?

A. About a year or so.

Q. Were all of those wells that were abandoned on the adjoining property comparable to the wells on this property?      A. Yes; about the same horizon.

Q. And same depths?      A. Yes; approximately.

Q. How do you know that?      A. Well, I happen to have lived up there and saw a lot of the wells drilled. It was just common knowledge in the territory over a period of years.

Q. Does it make a difference in the way a well is abandoned as to the type of casing that is in a well and the quantity of casing that is in a well?

A. Will you repeat that question? That is a little ambiguous. I didn't get it.

Q. I will reframe it. What were the average depths of the wells on this property?

A. Oh, as I recall, they ranged or averaged from 2,200 to 2,700 feet or probably an average of 2,400 feet.

Q. If the casing in one well went clear down to the bottom, would it be abandoned in a different manner [86] and at a different cost than if the casing only went half-way down?

A. The whole thing depends on how many strings of casing you have got in your well.

(Deposition of T. H. Clements.)

Q. Do you mean by that, if you have several wells, each drilled at the same depth, that it might require a different manner of abandonment for each one, depending on what the casing is in that well? A. Why, sure.

Q. Then, the fact that there were wells on the adjoining property—is that the Casmite property you are talking about? A. Yes; the old Associated property.

Q. —that there were wells on that property drilled to approximately the same depths as the wells on the Richfield property, would not be any indication as to what the cost of abandoning the Richfield wells would be, is that right?

A. Yes; it would be an indication because they were drilled at the same time and approximately in the same manner and under approximately the same conditions.

Q. Do you know whether they had the same casing programs in them as the Richfield wells?

A. From observation, I would say they approximated the same.

Q. From observation of what?

A. Of seeing those wells pulled and later from [87] observing these wells.

Q. How many wells did you see pulled on the Casmite property? And, when you say pulled, do you mean abandoned?

A. Abandoned; yes. I think there was a total of around 10 or 12 wells that they abandoned there. I saw them pulling one or two of them.

Q. So your estimate is based upon the two that you saw? A. That is right.

(Deposition of T. H. Clements.)

Q. Do you know now if the casing in the various wells on the Richfield property was identical in each well, that is to say, the quantity of casing?

A. Oh, definitely not. They all varied.

Q. They all differed, didn't they?      A. Oh, yes.

Q. Between fairly wide degrees, did they not?

A. Oh, not within wide degrees. They would average up pretty much.

Q. Have you examined the logs and histories of those logs recently and do you now know the casing record and casing program in those wells?

A. Pretty much so over the period of the last year.

Q. Were you familiar with it at the time you and Mr. Ferer were making that examination of the property?

A. In a general way. I answered that this morning. I said I looked over some of those logs before and [88] the profile maps were in the office there. Some of them were on the wall.

Q. That was about five years before?

A. That is correct.

Q. Other than the knowledge that you had as to the pulling of the production strings, that is to say, the tubing, did you know of any other work that had to be done on those wells between that date five years prior to the date of the contract and the time when you and Mr. Ferer were making that examination?      A. No.

Q. You didn't know whether any of those wells had been pulled or the casing pulled out or not, is that correct?



(Deposition of T. H. Clements.)

Mr. Krasne: That has been asked and answered.

A. I will answer it. In other words, there was apparently no change in the exterior appearance of those wells around there other than the derricks were gone. And, if they had cemented off those wells and so forth, there would be indications of cementing work being done recently.

Q. By Mr. Paradise: Taking a representative well on the property, will you tell me how it would be abandoned, that is to say, the quantity of cement that would be necessary to put in it?

A. A lot of those wells varied in the amount of open hole below the bottom casing. Some of them had 300 or 400 feet of well and some of them only took in 70 [89] or 80 feet of formation as I remember it. We checked it over and, as I recall, similar wells wouldn't take over about 80 sacks of cement and some of them in an extreme case, as I remember, took around 350.

Q. When you say we made an estimate, of what period are you talking? Are you speaking now of the time when you and Mr. Ferer were on the property?

A. Heavens, no; later.

Q. When you say later, do you mean before or after the contract was made?

A. On the estimated amount of cement for the sealing off of those wells we took individual wells and figured it later. When we figured the original figure I gave you awhile ago of the \$30,000 or \$40,000 for the abandonment, that included all labor, cement and other material.

(Deposition of T. H. Clements.)

Q. That estimate was not made by you until some time after the contract was signed, is that correct?

A. The more precise estimate was made later but we were figuring a certain amount of that money for cement in the original deal, if that is what you mean. That was part of the estimate, if you want to analyze it that way, because it was part of the \$30,000 or \$40,000 figure.

Q. In making up that \$30,000 or \$40,000 figure you included a specific quantity of cement, did you?

A. Yes. We were basing that on approximately an average of around 250 sacks. [90]

Q. Is that per well?              A. That is right.

Q. What other cost did you contemplate in making that estimate of \$30,000 to \$40,000 as the cost of abandonment work?

A. Well, there is labor and rental of the equipment and there is dynamiting charges and there are charges assessed for inspection work and the cost of pumping out and taking your shut-off tests, in other words, the usual things incidental to the abandonment of a well.

Q. Did you include the rigging-up operations, the cost of rigging-up operations, in your estimate?

A. We were figuring on a portable unit that would go in there and pull them.

Q. Did your estimate include the cost of cleaning out those wells?              A. Oh, yes.

Q. How much did you estimate that to be?

A. It was all included in this \$30,000 or \$40,000 figure.

(Deposition of T. H. Clements.)

Q. How much of the \$30,000 or \$40,000 figure did that include? A. I have forgotten.

Q. Was it a large factor? Was it half of the amount or was it less?

A. Well, we were basing part of our figure on [91] cleaning them out from the fact that there was some light distillate in one of those storage tanks up there on the lease, and we figured in most of the cases where it was tough going that we would pump some of that light distillate down those holes and cut them. Of course, we didn't know what we would be up against. Some of them might have sloughed up or off and we might be up against a bailer job. But we figured we could pump in some of that distillate and help the pumping operation in that way.

Q. How much distillate did you expect to have to use per well?

A. We didn't figure any definite quantity from the fact that most of those wells around there had been abandoned and they hadn't used distillate but I figured, if we got in tough going, we would have something to fall back on.

Q. Was that distillate some belonging to Aaron Ferer & Sons? A. Yes.

Q. Distillate that Aaron Ferer & Sons were going to bring on the property?

A. No. It was there on the property in one of the storage tanks we bought.

Q. Did this sale that you were contemplating or this purchase that you were contemplating include any oil? A. It wasn't excluded in our contract. [92]

(Deposition of T. H. Clements.)

Q. Did you expect to get much oil under this contract?

A. Yes.

Q. How much?

A. Well, for instance, we had one tank there, which was a 5000-barrel tank, which at that time we thought was full of distillate. We thought there was between 3,500 and 4,000 barrels of distillate but, as a matter of fact, it proved later on that it was about 80 per cent water; that there was a light film of distillate on top. We figured there was quite a little bit of distillate in the tanks but, when it came to a showdown, we didn't get the crude we thought we would get.

Q. Did any Richfield representative tell you that you were going to purchase any oil under this arrangement that you were then discussing? A. No.

Q. On what basis did you assume that you were going to purchase any oil under this arrangement?

A. Whenever you buy a bunch of tanks in a field, it is general practice that you get the oil that is in those tanks when you buy those tanks.

Q. This is general practice, you say? A. Yes.

Q. In which tanks was this distillate located?

A. The distillate was only in the one tank, in that 5400-barrel riveted tank. [93]

Q. Was this distillate in any of the tanks which Richfield excluded from sale under this contract?

A. I never examined the oil that was in the tanks which were excluded from the contract. I know there was oil in those tanks which were excluded but what the nature of the oil was in those tanks I don't know.

(Deposition of T. H. Clements.)

Q. But the distillate that you are speaking of was not located in the excluded tanks, is that correct?

A. The distillate in question was in the included tanks in the contract.

Q. That figure that you estimated would be the cost of abandoning these wells was an aggregate figure, is that correct? A. That is right.

Q. Covering how many wells?

A. Oh, we figured we would probably be able to abandon anywhere from 50 to 65 possibly.

Q. I don't quite understand, Mr. Clements, when you say you would abandon from 50 to 65. Was it contemplated by you at the time you were making this examination of the property that, if the wells were to be included in the transaction, you would abandon only a part of the wells?

A. There were certain wells we might not be able to abandon for the reason they might be of such a nature they would cost you more to abandon them than to leave them alone, in which case we were going to leave [94] those alone that wouldn't show any profit.

Q. How many of those did you think that there were?

A. We were guessing. We didn't know.

Q. How were you going to find out about that?

A. You don't know until you open it up and start to go in the hole.

Q. Would you have to put a mast on the hole and open it up before you could find that out?

(Deposition of T. H. Clements.)

A. The casing might have collapsed or it might have shifted or the hole might have filled up with mud. There are lots of reasons why certain wells wouldn't be proper to go into.

Q. Could you tell about any of the wells before you entered them?

A. No. When you go into a well, it is like a pig in a poke. You just work on the law of averages.

Q. So it was your intention, then, that the way you would start on this job would be to open up a well and go into it and, if you estimated at that time that the cost of doing the abandonment work would be more than the value of the casing that you would recover, you would not proceed with the abandonment work?

A. Unless you had gotten so far you couldn't back up.

Q. How would you go about finding out?

A. You would just have to try it, is all. [95]

Q. What would be your first operation on a well?

A. First, running your bailer to see what the condition of your hole was, to see if you could bail clear to the bottom.

Q. And, if you could not go to the bottom, then what would you do?

A. That is, to see how tough it was going to be to run a bailer in there and start to bail out. If you bailed out several days and saw you were not getting anywhere, you would call it a bad job and put the cap back on the hole.

(Deposition of T. H. Clements.)

Q. Are you familiar with the quality of the oil that is produced at Casmalia?

A. I have heard it called liver rather than oil.

Q. It is very heavy gravity, isn't it?

A. That is right.

Q. About 8 or 9 gravity, isn't it?

A. I don't believe it is as bad as all that. We had some oil in one of those tanks which was supposed to be more or less of an average and, as I recall, the figure was 11.6.

Q. Does the fact that there was heavy oil in those wells—would that make it harder or easier to bail out?

A. It depends on a lot of factors. It depends on whether the oil was clean or if it was emulsified and it would depend on whether any mud had shoved in with it and it would depend on temperatures. Temperature is a big factor [96] in that oil. Temperature is a big factor in the viscosity in those wells.

Q. Would the fact that those wells hadn't been producing since 1925 or 1926 make it harder to bail them out?

A. In all probabilities; yes.

Q. Then, you didn't know at that time how many of those wells you would want to abandon, is that correct?

A. We don't know even at this time.

Q. Did you know whether that field had been fully depleted, that oil field, under that property?

(Deposition of T. H. Clements.)

A. I didn't know about depletion but it was the general talk around the country that they had more or less stopped operations because it was too costly to operate and the character of the oil was too heavy and it wasn't a good market outlet.

Q. Are you acquainted with the history of those wells in that field? I mean the wells on the Richfield property. Or perhaps that question is too general. I will strike it out. Do you know when those wells were drilled?

A. Well, in general; yes. I believe some of the early ones were drilled in 1916 or 1917 and they were drilling up to about 1924, 1923 or 1924.

Q. Do you know when they last produced?

A. Not specifically but, in general, I think around 1925 or 1926.

Q. Did you ever make an estimate, based upon [97] your examination of that property, as to the quantity of recoverable oil still underground that remained at the time those wells were taken off production?

A. I am not a geologist.

Q. Do you have any information or knowledge about that?      A. The thought never even occurred to me.

Q. But you did know that the wells were taken off of production because of a price and market factor?

A. I have been told that but I didn't know what the factors were.

Q. Did you know that in December of 1940, when you were discussing this transaction with Mr. Ferer, at the time you examined the property—

A. Did I know what?



(Deposition of T. H. Clements.)

Q. Did you know at the time you and Mr. Ferer were discussing the property on your visit to Casmalia, that same matter that you said you knew about, that the wells were taken off of production in about 1925 or 1926 because of a market and price condition?

Mr. Krasne: That is assuming facts not in evidence. The witness testified that the wells were taken off production because the quality of the oil was such that the wells could only be operated at a loss and that it was unprofitable to deal in that oil.

Q. By Mr. Paradise: Did you understand the [98] question? A. He answered it.

Q. Yes; but Mr. Krasne is not testifying. You are.

A. Well, again, I will have to go by hearsay because it is not first-hand knowledge. I wasn't on the property there when they shut down or I wasn't called in and consulted but I had heard that the Doheny people were having a hard time to produce the property and they had even gone to the trouble of experimenting up there and pumping hot distillate down some of the wells, in the hope of making the production of some of the adjacent wells climb.

Q. At the time you and Mr. Ferer were examining the property and discussing this matter of the abandonment of those wells— By the way, did you discuss this matter of abandonment of the oil wells with Mr. Ferer on that day?

A. We very precisely went over and estimated how many feet of pipe we could get out of the wells and cer-

(Deposition of T. H. Clements.)

tainly, when we discussed that, we had to discuss abandonment because that was part of the attendant difficulties, naturally.

Q. At the time you were discussing that with Mr. Ferer, did you either know or have reason to believe that the oil under that property, the oil pool or reservoir, had not been fully depleted and that those wells could again be produced or be operated for the production of oil?

A. It didn't sound very logical to think that they would produce again if after all these years they never made a move to produce them. [99]

Q. But you mentioned before that you understood the reason that they were taken off production in 1926 was because of the quality of the oil and the price at that time, is that correct?

A. And operative difficulties. I understood the difficulties in operation there were terrific and I understand the costs of operation and production were very high and it wasn't profitable.

Q. Do you know whether the requirements of the Division of Oil and Gas as to the abandonment of wells are stricter and more stringent where you are in an undepleted field than when the field has been completely depleted and all of the oil taken out?

A. The abandonment of oil wells has been more or less a human factor with the representative of the department in that particular field, I had always been told.

Mr. Paradise: Will you read the question, please?

(Question read by notary.)

(Deposition of T. H. Clements.)

Q. I don't believe you answered that question, Mr. Clements.

A. Well, I think as to the abandonment program in any oil field that the determining factor is the nature of the oil field and, as you say, the number of surrounding wells and many other factors, that is, if it is an undepleted field and there is a surrounding edge of marginal wells still pumping, it is a cinch they are going to be pretty tough on [100] your abandonment program.

Q. It was your intention, then, as I understand it, that in so far as the wells on the property were concerned you were going to enter those wells and abandon those which were profitable to abandon and not abandon those which you considered unprofitable to abandon, is that correct?

A. With the exception of one other stipulation, that, if we got into it so far where the State demanded it, we might have to abandon and spend a money outlay for those few wells which we couldn't profitably pull.

Q. If the State demanded it?

A. Yes; if the State demanded we clear them up entirely, we might have to do that. We might have to go back to those wells which could not be abandoned at a good profit and do it anyhow.

Q. Did you discuss that matter with Mr. Ferer?

A. I did.

Q. But, if the State didn't require it, you didn't propose to do it, is that correct?      A. That is right.

Q. At what point would you know whether a well would be unprofitable to abandon? Was it just when you commenced your bailing operation?

(Deposition of T. H. Clements.)

A. Oh, no. As a matter of fact, you wouldn't know all of the answer to that until you had pulled probably a dozen wells. [101]

Q. And, if the results of the abandonment of the first dozen wells showed an over-all loss, then what was your intention at that time?

A. We didn't anticipate that they would show a loss. As I stated at the start of the interrogation, we figured that we would make a good profit off of them and we were not anticipating any loss.

Q. I thought you said you wouldn't know whether you had made a profit or a loss until you had abandoned some 10 or 12 wells?

A. You wouldn't know whether you had made a profit or loss on every well until you had gone into a dozen and learned by experience the type of well which wasn't profitable to continue abandonment on. In other words, there were certain wells with a relatively small amount of casing or pipe which you could pull out and others where there were gobs of pipe, you might say, that could be pulled out and you wouldn't know your breakdown point or which wells to avoid, which were swapping dollars or even losing you money, until you had gone into some representative of the extremes to establish your cost factors.

Q. And, if you had abandoned 10 wells and determined that you had made no profit on those 10 wells, then what was your understanding as to what you intended to do?

A. We never discussed that angle because we didn't consider that. [102]

Q. You didn't consider that at all?

A. No.

(Deposition of T. H. Clements.)

Q. But you did consider that it might become desirable to abandon some wells and not others, is that right?

A. Yes. In other words, we knew that there would be some wells, which would have a minimum of casing, which might not prove very profitable.

Q. Was any of this discussed with Richfield?

A. No.

Q. Or with any Richfield representative?

A. The answer is no.

Q. You never asked any Richfield representative which wells it was willing to have abandoned and which ones it was not willing to have abandoned, is that correct?

A. I never discussed it with them.

Q. Did you ever discuss with any Richfield representative the fact that you might desire to pull certain wells and not desire to pull others?

A. I never discussed it.

Q. Did you intend in connection with the right that you say you expected to get to pull this recoverable casing to assume an obligation to Richfield to abandon those wells?

A. There was no question in our minds of an obligation. If we bought everything on the property in the way of pipe, there was no obligation, as long as we had paid cash for it, between ourselves and Richfield. The obligation would be to [103] straighten out any difficulties in the abandonment between ourselves and the Bureau of Mines.

Q. The Bureau of Mines is not the owner of that property, is it? Well, I think that is obvious. The Bureau of Mines is a general regulatory body that has charge of the abandonment of oil wells, is it not?

(Deposition of T. H. Clements.)

A. Among other duties; yes.

Q. Did you consider at that time the fact that the Richfield Oil Corporation as the owner of an undepleted reservoir of oil would have some voice in the abandonment of those wells in addition to any direction to you from the Division of Oil and Gas?

A. When the Richfield say they want to sell everything on the property and they are going to go ahead and make a good piece of cattle grazing land out of it and are even going to take the storage tanks off of the property—the idea of considering it as a future, potential source of oil never entered our heads.

Q. Are you talking now about a conversation you had with some Richfield representative where that was said or is that your surmise?

A. In your contract there it stipulates that you have got to be very careful to keep the fences up for cattle; that you had to clean up all of your sumps and you had to go ahead and remove anything that cattle could fall into.

Q. Going back to your answer to the preceding [104] question, I will again ask you if what you stated there, and, if you don't recall it, I will ask the reporter to read it to you, was the substance of a conversation between you and some Richfield representative or if that was merely your surmise?

A. That was the conversation held in this room and you were present.

Q. Who else was present, Mr. Clements?    A. Mr. Davis and Mr. Ferer and myself.

Q. To what part of that conversation are you referring?

(Deposition of T. H. Clements.)

A. When we were discussing the abandonment of this property, we at that time said, "Now, you are leaving temporarily those storage tanks on that property. We are interested in buying them. Can't we buy them to make the job 100 per cent complete?" And the answer was, "No; the production department wants to take those over to Maricopa."

Q. Who was it said that?

A. Mr. Davis, who sat in that chair.

Q. You mentioned the fact that the property was to be used thereafter by Richfield for cattle grazing. There is no reason why the property cannot be used for oil production even though it is being used for cattle grazing, is that correct?

A. If it is going to be used for oil production, why would they remove from it production tanks, pipe lines, [105] loading rack facilities, boiler facilities and house facilities? Why would everything be removed from the property?

Q. Mr. Clements, I am not asking for your argument on the matter but merely for answers to my questions.

A. The answer is that those are the questions that led us to form definite conclusions.

Q. You are, of course, acquainted with the condition of those boilers and tanks or what the condition was at the time this contract was made?

A. Both before and afterwards.

Q. Were those suitable for present production operations? Was the condition of those facilities suitable for present production operations?

(Deposition of T. H. Clements.)

A. The pipe lines were perfect.

Q. What about the tanks?

A. Some were good and some bad.

Q. And the boilers?

A. For the purpose for which they were used primarily, which was for heating purposes on these gut lines, they could be used another 50 years.

Q. They were how old, Mr. Clements?

A. Most of the boilers had been put in there from 1917 to 1925.

Q. And those items of equipment that you just mentioned had not been in operation for over 15 years, isn't [106] that correct?

A. The boilers had not been depreciated in quality. They were all right for low pressure steam service, which they were originally installed for.

Q. This intention of yours of abandoning only part of the wells and not abandoning others you say was never discussed with the Richfield?      A. No.

Q. I don't recall your answer to one question. Did you say that you intended or did not intend to assume an obligation to Richfield to abandon those wells?

A. I said in my mind I didn't see any obligation, after we had bought everything there, as to what happened to it so long as we didn't go ahead and interfere with the surface condition of the property. It was stressed in the contract and all of the conversations of abandoning the property and leaving it in good level shape so that cattle could not fall down the holes or otherwise put up barriers of harassment for them.



(Deposition of T. H. Clements.)

Q. Did it occur to you that the reason of the discussions as to the maintenance of the surface condition of the property was primarily because Richfield didn't have any idea that you intended to purchase the casing in the wells or to abandon any of those wells?

A. The idea never occurred to me.

Q. You did not then intend to assume an obligation to [107] abandon any one or more wells, is that correct?

A. I don't see that there was any obligation to Richfield if you once buy something.

Q. You did intend to assume an obligation to clean up the property, did you not, the surface of the property?

Mr. Krasne: At what time?

Q. By Mr. Paradise: At the time the negotiations for this contract were being conducted and before the contract was signed.

A. We were going to live up to all of the obligations both to the State government and all liabilities attendant on the abandonment of that property and so stipulated and so signed it and executed it in that contract.

Q. Those obligations in your mind included only an obligation to clean up the surface but no obligation with respect to the abandonment of the wells, is that right?

A. Certainly, the obligation is there. I am no lawyer but I thought the obligation lay between A. Ferer & Sons and the Bureau of Mines, their satisfaction of the correct procedure and method of that abandonment.

Q. Did you think, if the Bureau of Mines was satisfied with any particular type of abandonment, that would also

(Deposition of T. H. Clements.)

be satisfactory to Richfield as the owner of an undepleted oil field and that Richfield would have no interest in the matter?

A. I didn't think that the Richfield considered it as [108] undepleted. I thought that was a fifth wheel they had accumulated from the Doheny interests when they bought it over and that they were sorry they had it.

Q. That was just your thought in the matter, was it not?      A. Yes; my thought.

Q. You have no knowledge of the valuation Richfield now places and has placed upon that property on its books, is that correct?      A. None whatsoever.

Q. All this that you have been stating as to your examination of the property and your discussions with Mr. Ferer occurred on the first day when you went up to the property with Mr. Ferer, some time in December, 1940, is that correct?

A. Will you read that question?

(Question read by notary.)

A. It was the first time we had discussed the procedure or the pro and con of what we had to do on the pulling of the pipe in those wells.

Q. I was merely trying to identify the date of this testimony that you have just given about your examination of the property. These conversations and examinations took place on that date when you and Mr. Ferer visited the property, did they?

A. Oh, no. You are covering a pretty wide range there. [109] I had been on that property probably 30 or

(Deposition of T. H. Clements.)

40 times prior to the time I went over the property with Mr. Ferer and I certainly would form conclusions about a lot of things prior to that.

Q. Let's take that step by step. Before that date in December with Mr. Ferer, I believe that you told me that you had not been on the property for five years, is that correct? A. No; that isn't the statement I made.

Q. I am in error on that. You were on the property and saw the work that Mr. Anderson was doing in pulling down the derricks?

A. No; I didn't say I saw him pulling down the derricks. I said I saw some of his crew cleaning up the debris from some of the derricks. But I stated before I had been on the property several times. As a matter of fact, I was trying to make a deal for part of the equipment there and made several trips in there and had taken dimensions and made reports on these various items which I had attempted at various times to purchase.

Q. Was that the first time that Mr. Ferer went up on the property with you?

A. That is the first time he went to the property with me.

Q. The time we have been discussing?

A. Yes; in the early part of December. [110]

Q. Subsequent to that time did Mr. Ferer and you again visit the property?

A. Not prior to the signing of the contract, I don't believe. Well, wait a minute. I think he put up a deposit but the contract was not drawn. I think he had one of his brothers from the east with him and I think we

(Deposition of T. H. Clements.)

went up there and looked over the property on a Sunday. There was a party of us. And I believe this time that we went up lay somewhere between the time the initial deposit on the transaction had been put up and prior to the signing and execution of the contract. There was a time interval in there. I may be wrong in my dates. I am just thinking out loud on that one.

(Short recess.)

Q. At that second visit that you mentioned, that you made with Mr. Ferer and his brother from the east, was there any Richfield representative along on your inspection trip?      A. No.

Q. Had you talked to any Richfield representative between your first visit to the property with Mr. Ferer and the second one that you mentioned?

A. I called up Davis once or twice and asked him who was the high bidder and I think Davis called me up and said we were the high bidder and that we would get together at some near date or something like that. I think there were two or three telephone conversations.

Q. Did you, yourself, make any other inspections of [111] the property between those two visits by Mr. Ferer?

A. No.

Q. Did you make any visits to the property after the second visit of Mr. Ferer and before the signing of the contract?      A. I don't recall any; no.

Q. Did you ever inspect the property with Mr. McGahan of Richfield?

A. Not prior to the signing of the contract.

Q. Not prior to the signing of the contract?

(Deposition of T. H. Clements.)

A. No.

Q. Do you know Mr. McGahan? A. Yes.

Q. Did you ever talk to him at Casmalia about this transaction?

A. Never at Casmalia before the contract was signed but I have talked to him at his office in Long Beach several times.

Q. Don't you recall an incident while these negotiations were under way and while you were making your bid or making up your bid for this purchase; that you visited Casmalia one afternoon and you and Mr. McGahan went up on a hill and he pointed out on a map various tanks and boilers and other property that was to be sold under this arrangement?

A. No. I went over with him on such an occasion but it was after the signing of the contract. [112]

Q. After the signing of the contract? That was not before the signing of the contract? A. No.

Q. Can you fix the date of that?

A. Some time the middle or latter part of January.

Q. In the middle or latter part of January?

A. Yes.

Q. The contract was signed on January 17th?

A. That is right.

Q. And it was not prior to that time? A. No.

Q. What occurred when you and Mr. McGahan discussed this transaction at Casmalia?

A. I asked him to point out the limitation of the retained pipe around the tanks and I think we discussed at

(Deposition of T. H. Clements.)

that time about the use of some of those bunk houses up there which, peculiarly, I don't think are excluded in the contract, but when we got the map back were excluded on some current transaction. And then we discussed certain pipe line facilities that came through there, which were leased to the O. C. Fields Gasoline Company. In other words, they had a lease arrangement with the Richfield on one or two of those storage tanks below and they were pumping or gravitating down some of the oil from some of the canyon wells, I believe, into one of those storage tanks and then regravitating it out across the Morganti lease to a shipping pump. And the [113] exact location of those lines which were retained and had to be retained to facilitate that oil movement had been merely conversation. They hadn't been pointed out to us specifically and I wanted to get straightened out as to where those lines lay.

Q. Did Mr. McGahan point out to you the gas lines to certain wells that were to be excluded from the sale?

A. I don't recall. He pointed out certain water lines that had to be kept there on the property.

Q. Do you recall that certain gas lines to certain wells were to be excluded from the sale, from the property to be sold?

Mr. Krasne: The ones set forth in the contract or outside of that? Are you talking about the gas lines being excluded by the terms of the written contract or that were to be excluded otherwise?

Mr. Paradise: What was my question?

(Question read by notary.)

(Deposition of T. H. Clements.)

Q. Do you recall that the contract provides that certain gas lines are to be excluded from the sale?

A. It seems to me that it does.

Q. Prior to the time the contract was signed, with whom did you have any discussion about those gas lines? And when I say with whom, I mean any Richfield representative.

A. I don't believe we ever discussed it.

Q. It was never discussed? [114]

A. I don't recall it.

Q. When did you first hear about the exclusion of gas lines?

A. When we were digging up the lines up there, one of the foremen said, "The Richfield want that 2-inch line left in over there." And I said, "Well, hell, it is an old shot line. We will leave it alone if they want."

Q. Is that the first time you heard about the exclusion of gas lines?

A. That it the first time I recall.

Q. Did you read this contract at the time it was signed?

A. You were sitting there and I read it right here along with Mr. Ferer.

Q. When you read it, you did not see that there was an exclusion of certain gas lines?

A. I don't recall it.

Mr. Krasne: If you want to see the contract for the purpose of refreshing your recollection, Mr. Clements, I am sure he will let you see it.

A. He asked me if I remembered it. I don't remember it. It may have been in there. I don't know.

(Deposition of T. H. Clements.)

Mr. Paradise: I would like to take advantage of Mr. Krasne's suggestion and show the contract to the witness.

Mr. Krasne: I presume counsel is directing your attention to subdivision (h) of the first paragraph of the [115] contract.

Q. By Mr. Paradise: You might read that out loud or I will read it. Subdivision (h) provides as one of the stated exceptions from the contract, "gas pipe lines connecting wells on the land above described to the superintendent's house." Do you recall any discussion prior to the signing of the contract of those gas lines?

A. I never discussed them with anybody prior to the signing of the contract.

Q. You didn't know at the time the contract was signed that those gas lines were excluded?     A. No.

Q. Mr. McGahan never pointed them out to you?

A. No.

Q. The gas lines?     A. No.

Q. Either before or after the signing of the contract, is that correct?

A. No. The first occasion I knew about it, when it was called to my attention, was when the foremen up there said they wanted a certain 2-inch gas line left there and I went over and looked at it and there was a piece of 2-inch pipe in very bad condition there, and I said I wouldn't fight with them over it.

Q. In any discussion that you had with any Richfield representative or employee prior to the signing of the [116] contract, were you ever furnished any list or inventory of the specific items of facilities and equipment to be sold under this transaction?



(Deposition of T. H. Clements.)

A. No; I wasn't furnished it. McGahan said one day in his office, "I have got a list here that you can look at of what is excluded," and I picked it up and looked at it and in it it enumerated these stills and some 4-inch pipe to the O. C. Fields Company.

Q. Did that list include the items to be sold as well as the items to be excluded?

A. No. These were just the exclusion items. I asked McGahan for an inventory on the thing and he says, "I can't give you one." We asked for it but we never got an inventory.

Q. When was that?

A. It was in the early part of December, when Harold Davis told me to get in touch with McGahan and they were about ready to call for bids; and I went down to McGahan's office and asked for a physical inventory on the property so we could bid on it, and he said, "We haven't got a prepared inventory but we have got certain items excluded and here is what they are," and he passed over the sheet and I read it.

Q. Was there any mention at that time of the wells on the property or the casing in any of the wells?

A. There was no detailed discussion about any of the [117] items on the whole property, wells or anything else.

Q. Didn't Mr. McGahan tell you that the tanks were to be left remaining on the property for the purpose of future production operations, those excluded tanks that are listed in the contract?

A. The answer is no. At that first conversation the six excluded tanks were some of the items listed and

(Deposition of T. H. Clements.)

McGahan merely said, "These are not for sale." But in later conversations with Mr. Davis, we asked if we could buy them and then we got the answer no; they were to be used over at Maricopa.

Q. Neither Mr. McGahan nor Mr. Davis ever stated to you that those tanks were to be left upon the property for future production purposes? A. Heavens, no.

Q. What other conversations have you had about this matter with any Richfield employees or representatives other than the conversations that you have referred to?

A. What matter?

Q. The transaction of purchase by you, Aaron Ferer & Sons, and sale by Richfield of equipment and facilities at Casmalia.

A. Subsequent to signing the contract?

Q. Prior to the contract. A. None.

Q. You recall a conversation in my office here, do [118] you not, on the matter?

A. Do you mean when we came up to execute the contract with Mr. Ferer?

Q. No; before the contract was prepared.

A. Who was present?

Q. Well, do you recall the conversation?

A. No; I don't.

Q. You don't recall any meeting? A. No.

Q. Do you recall how many times the contract and the drafting of the contract were discussed at any meetings at which I was present?

(Deposition of T. H. Clements.)

A. I only recall the one time. I didn't know there was any other time.

Q. Had the contract been prepared at that time or was it still to be prepared?

A. As I recall it, when we came up here, you had prepared the contract and Mr. Ferer and I sat here and read it over and Mr. Ferer asked that certain changes be made in the contract, and later those contracts were mailed out for execution, I believe. I don't think there was another conference held. That is my impression on it. And I don't remember any meeting in this office other than that one.

Q. You don't recall any prior meetings at all in this office?

A. No. We had a prior meeting down in Harold Davis's [119] office there but I don't recall any meeting here.

Q. Who were present at that prior meeting in Harold Davis's office?

A. I think Mr. Ferer and Mr. Davis and myself. I don't recall anyone else. Maybe McGahan was there. I don't know. I don't remember it.

Q. Do you recall whether I was present?

A. I remember Davis calling you over the telephone.

Q. At that meeting in Mr. Davis's office, at which were present you and Mr. Ferer and Mr. Davis and perhaps Mr. McGahan, but no others, as I understand it,—

A. Not that I remember.

Q. —was there any discussion whatsoever of the wells on the property or the casing in the wells?

(Deposition of T. H. Clements.)

A. The whole conversation was the items excluded. At no time was discussed the items particularly which were being sold. In other words, the context of the conversations all the way through was of excluded items and to clarify the issue on excluded items.

Q. What was the issue on excluded items?

A. To be sure everybody had in mind what were the excluded items and how far it went, for instance, pipes, how far intercommunicating pipes went and all of that sort of thing.

Q. Do you mean the pipes to the stills?

A. No; the pipes to the tanks, the pipes which O. C. [120] Fields was using.

Q. You never inquired of any Richfield employee at that meeting that you speak of concerning the wells or the casing in the wells?

A. Not with them at that time, no more than we ever discussed the character of the tanks or the character of the pumps or the character of the brick. None of that was discussed.

Q. Did you discuss the abandonment of the wells?

A. We did not.

Q. You say that following that there was a meeting in my office?      A. Yes.

Q. At which a draft of the contract was presented for your examination?      A. Yes.

Q. Do you recall on what date that occurred?

A. It was somewhere between the 7th and the 15th of January, I believe.

(Deposition of T. H. Clements.)

Q. Who were present at that conversation?

A. Yourself, Mr. Davis and Mr. McGahan, I think, and Mr. Ferer and myself.

Q. At that conversation did both you and Mr. Ferer read the contract?

A. Yes. He sat there and I sat here and we both read it. [121]

Q. You stated that, after reading the contract, Mr. Ferer requested certain changes?

A. That is right.

Q. Do you recall what was said?

A. Not specific words but I remember Mr. Ferer saying, "Well, you are selling everything on the whole lease and this certain phrase in here is ambiguous. It isn't all-inclusive so that there is no ambiguity in the thing." So you went ahead and put in the words "all metal". I think the phrase was "all metal and lumber." And I think that phrase was substituted in one paragraph.

Q. Substituted for what?

A. For some other phrase which Mr. Ferer interpreted as being a little ambiguous. I think that was the only change suggested. That is the only one I remember.

Q. Was there any discussion at that time as to what types of equipment were referred to by the word "metal"?

A. There might have been some discussion at the time. I can't recollect it all, although I do remember the substitution of that paragraph, or in that paragraph. And

(Deposition of T. H. Clements.)

there was probably some conversation between you and Mr. Ferer at the time but I am afraid I don't recall the context of it. There probably was but I don't remember it.

Q. Did you participate in that conversation?

A. I don't think I said anything. I think Mr. Ferer did all of the talking about it. I don't think I said [122] anything.

Q. Do you recall at the time that the word "metal" was used that specific types of equipment were being discussed in that same connection?

A. Have you got that preliminary contract present here? I think, if I looked at that paragraph and saw it modified, it might refresh my mind as to the context of the conversation at that time. I don't remember it. If you have got the preliminary contract, I might be able to look at it and remember it, except I remember that that conversation took place and the change was made.

Q. All I have here, Mr. Clements, is a draft of the contract that is attached to the amended complaint in this action. Mr. Krasne, do you have any document of the sort that Mr. Clements wants to refresh his recollection with?

Mr. Krasne: No; I have never seen it.

Q. By Mr. Paradise: Do you recall, Mr. Clements, that the discussion as to metal and lumber was in connection with loose scrap metal lying on the ground?

A. Oh, heavens, no. That word "metal" was all-inclusive, whether the metal was above the ground or below the ground.

(Deposition of T. H. Clements.)

Q. Are you repeating a conversation or is this merely your own surmise?

A. That was the context of the conversation held. We were not discussing scrap metal at that conversation that [123] I remember.

Q. Will you please, then, repeat the conversation and state what was said by each person?

A. Can I see that contract and see that paragraph?

Q. Certainly.

A. I want to see the paragraph that I was questioning about relative to where we substituted the phrase "all metal and lumber".

Q. I will point out to you, Mr. Clements, that on page 2 of the contract, in paragraph 1, the phrase "metal and lumber" is used. A. Oh, yes; I see it.

Q. What I have asked you is what were the conversations concerning that point.

A. Well, I may be wrong on this but this is the impression the way I remember it—

Q. I am not asking for your impressions but your recollection of the conversation.

A. I can't give you it verbatim and I don't think anybody could. As I recall it, Mr. Ferer spoke to Mr. Davis in this chair over here and said, "Mr. Davis, this contract includes everything on that property, so, to clarify that, can we not have this paragraph changed and the words 'all metal and lumber' added to it to clarify the whole issue?" And I think Mr. Davis turned around to you and said, "Well, I don't see any objection", and I think

(Deposition of T. H. Clements.)

you agreed with him. [124] I think that is the way the thing occurred and I think that is the way the conversation was held. I don't recall personally of making any remarks in connection with it. Mr. Ferer carried the conversation along.

Q. You stated in answer to a previous question that it was stated that metal would include all metal both under the ground and above the ground. Was there any conversation of that sort at all?

A. No. We merely said everything there on the property.

Q. Was there any conversation at all about anything under the ground?

A. Well, the answer to that certainly must be yes because we were certainly discussing pipe lines which lay under the ground.

Q. I am not asking for what certainly must have occurred. I am asking you what did occur. Was the word "underground" ever used as you have just said?

A. Well, in the general conversation we certainly must have discussed underground piping.

Q. Not what you must have discussed but what you did discuss.

A. I don't remember any particular conversations relative thereto.

Q. There was no mention of the word "underground", was there?

A. I won't say there was or wasn't. [125]

Q. Do you recall that there was and, if so, by whom?



(Deposition of T. H. Clements.)

A. I merely got that general impression. I can't remember a specific conversation over a period of a year.

Q. Isn't a fact that there never was a mention of underground and that the only items of equipment that were being discussed were items on the surface of the ground?

A. That is not true.

Q. Wherein is that incorrect?

A. Two-thirds of the pipe lines which we were buying were buried underground.

Q. They were exposed for a considerable portion of their distance, were they not?

A. Heavens, no.

Q. They were not exposed?

A. No.

Q. None of the pipe lines were exposed?

A. Some of them were. I said two-thirds of them were not.

Q. They were all connecting with those which were exposed, were they not?

A. Not necessarily. There were lines, for instance, which would go up the valley and they would go three-quarters of a mile and you couldn't find them unless you dug down two feet.

Q. Pipe lines are specifically mentioned in the contract, are they not, as being included in the sale? [126]

Mr. Krasne: I think the contract speaks for itself, Mr. Paradise. The question was whether any items that were underground were discussed and I think the witness has answered that.

(Deposition of T. H. Clements.)

Q. By Mr. Paradise: Is it not a fact, Mr. Clements, that the only item that is included in the contract, any portion of which was underground, is the pipe lines connecting the various wells?

A. Will you state that question again?

(Question read by notary.)

Mr. Krasne: By that question, Mr. Paradise, —

Mr. Paradise: I will strike that. It may be confusing.

Q. Is it not a fact, Mr. Clements, that in the discussion the only items, any portion of which were underground, which were mentioned were the pipe lines?

Mr. Krasne: I object to that on the ground it assumes facts not in evidence. This witness has testified that the only items that were specifically discussed were the items that were excluded; that there was no discussion about pipe lines or pipe in the wells or any other item that was included in the conveyance.

Mr. Paradise: I think, Mr. Krasne, you are referring to a different conversation, one of the conversations that occurred at an earlier point.

Q. At this conversation was there any mention of any other items? [127]

A. At which conversation, that took place where?

Q. This conversation we are talking about that took place in my office, the one when you were examining the contract and were discussing this phrase "all metal and lumber".

A. That conversation, again, largely rotated around the fact of certain items being excluded. As a matter of fact, at that conversation it was kind of hazy in

(Deposition of T. H. Clements.)

Mr. Davis's mind and your mind relative to the tanks or the stills which O. C. Fields got and how much pipe they got. And, as a matter of fact, there was a telephone call made from this room, I remember, to clarify the issue. In other words, the thing was a clarifying conference to see about the excluded items.

Q. Were there not also items discussed to be included as well as those to be excluded?

A. I don't remember any specific items so included in the conversation.

Q. Was the telephone conversation that you spoke of not a telephone call of Mr. Davis to the Casmite Company?

A. Yes, sir.

Q. To determine at what point they were going to cut off their connections to the stills?

A. That is right.

Q. At the conclusion of that conversation, was there not a discussion in this room among those then present about [128] the inclusion in the contract of all the metal supports to those stills?

A. Yes.

Q. Was there not also discussed in that same connection the loose scrap around the refinery, the corrugated iron sheets and wire lines and the scrap heap, as items to be included in the contract?

A. Well, I don't remember any conversation at that time about the wire rope coming up. The question was raised about certain big sheets of metal, about three-quarters of an inch thick and about 10 feet by 20, laying over to the refinery site, and Mr. Davis said those sheets went to O. C. Fields on their tank deal. That is the only loose metal that I remember being discussed.

(Deposition of T. H. Clements.)

Q. Was there not discussed at the time as being included in the contract the various overhead lines and steam lines in connection with the refinery property or I mean in connection with the refinery structures?

A. No. That was all in connection with the question of how much O. C. Fields got. We had previously included all of those lines in our original estimate of what we were going to get.

Q. Did you not state at that time, Mr. Clements, that you wanted to get under this contract the various overhead lines connecting the various stills and the various supports for the tanks and other property that the Casmite Company [129] had purchased and you also expected to get under this contract a lot of loose iron scrap metal around the refinery structures?

A. The last part of your question I can't answer. The first part of the question, yes.

Q. Weren't those things the matters which were being discussed when Mr. Ferer asked for the inclusion of "metal" in the contract?

A. Why, no. In other words, the way Mr. Ferer was thinking——

Q. I don't care for your surmise as to what he was thinking but what did he say?

A. He asked for the contract to be changed because he wanted it to be all-inclusive so as to clear up any ambiguity as to what we were to get.

Q. Do you recall Mr. Ferer reading this list of pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors and tanks, and stating that the items so

(Deposition of T. H. Clements.)

mentioned did not include the supports, steel supports, and overhead lines and scrap metal that was lying around loose, and that that was the reason he wanted the words "metal and lumber" put in, so that he could get that scrap metal and the other items as well as the loose lumber on the property?

A. I think Mr. Ferer did mention that certain items were not included in the contract and he wanted the contract changed so it would be inclusive of everything. I believe [130] that is the way he put it.

Q. You don't answer my question, Mr. Clements. I will ask the reporter to read it.

(Question read by notary.)

A. I don't think those were his exact words and I don't think that was the general context of his conversation or what he intended to imply in its entirety.

Mr. Paradise: I move to have that stricken as a conclusion of the witness.

Q. Now, will you try and recall what was said?

Mr. Krasne: I think the question has been asked and answered on several occasions. The witness has testified that Mr. Ferer stated in this room that the contract might be somewhat ambiguous with respect to this general statement of what was to be included and Mr. Ferer said it was the intention of the parties that everything on the lease was to be included except for the items specifically excluded, and that he suggested that that ambiguity would be clarified if you would include the other words "all metal and all lumber", and this witness has on two occasions said that that is substantially what Mr. Ferer said at the meeting.

(Deposition of T. H. Clements.)

Q. By Mr. Paradise: Do you recall anything more clearly about the conversations than you have stated?

A. No. I think it would be a reiteration of what I have previously said. I think Mr. Ferer addressed his remarks to Mr. Davis and said that, inasmuch as there were [131] numerous items which could not be included in the contract, that no contract could be drawn to include all of the items, and, no matter how thoroughly you drew the contract, he wanted the contract to be drawn all-inclusive and, if those two words were substituted, he would be satisfied, even though he didn't have a lawyer present, that the thing would be the way we had it in mind.

Q. Did either you or Mr. Ferer state at that time in connection with Mr. Ferer's suggestion that the words "metal and lumber" be added that the word "metal" referred to the casing in the wells?

A. Will you read the question, please?

(Question read by notary.)

A. Could I bother you again? I want to get the verb in the first part of the paragraph.

(Question reread by notary.)

A. There was no conversation held by me and I don't believe by Mr. Ferer outlining the all-inclusive items which would be included under the words "metal or lumber." But Mr. Ferer asked that that paragraph be substituted to clarify the issue in its entirety.

Q. When Mr. Ferer asked that the word "metal" be included and when that entire subject matter was being discussed at that conversation, was there any mention whatsoever of either the casing in the wells or the wells themselves?

(Deposition of T. H. Clements.)

A. No; nor the tanks nor the valves nor the fittings. [132]

Q. But there was mention at that time, was there not, of the supports for the stills and the overhead lines and the loose corrugated iron and other metal scrap lying around lose on the surface of the property?

A. I don't think Mr. Ferer would say anything about loose corrugated iron because there wasn't any on the property.

Q. I am not asking you for what he would have said. Will you please confine yourself to the conversations?

A. Yes. I don't think Mr. Ferer at any time said anything about any lose corrugated iron because there wasn't any there.

Q. Do you recall that there were discussed those other items that I mentioned at that meeting?

A. I know Mr. Ferer said there were a lot of items which were not included in this contract and he would like to have it all-inclusive so they would be included in there.

Q. Did he say what those items were?

A. No. He said too numerous to enumerate in the contract.

Q. Did he give any illustrations at all?

A. I think he gave one or two illustrations.

Q. What were they?

A. Well, for instance, I think he mentioned the revetements up there in the canyons. I think that was mentioned and miscellaneous steel. [133]

(Deposition of T. H. Clements.)

Q. Miscellaneous steel of what nature? Was it scrap lying on the surface of the ground?

A. No. I think he mentioned about the walkways, for instance, over those stills to O. C. Fields and I think he mentioned that in the warehouses there were numerous items. He brought that out, as I recall, pretty definitely. He said, as I recall, "In this warehouse there are nipples and valves and fittings in the warehouse stock. They are not included in the contract. There are lots of items like that. And, if we don't have this all-inclusive paragraph, you haven't got a definite contract."

Q. There was no mention of casing, however?

A. No; I don't remember it.

Q. Pardon me?

A. I don't think we ever did use the word "casing". Both Mr. Ferer and myself in the second-hand business very seldom use that word. We use the word "pipe" and I am sure he used the word "pipe" plenty of times.

Q. Was there any mention of wells?

A. I don't think they were even discussed.

Q. When he said pipe, he was referring to the pipe lines, was he not?

A. No. Anything that is pipe is pipe, whether it came out of the well or whether it was from there over to a tank.

Q. You mentioned that you are in the salvage business [134] and that you use the word "pipe" instead of "casing", is that correct?

A. Yes; largely. We very seldom use that word "casing".



(Deposition of T. H. Clements.)

Q. How familiar with the oil business are you?

A. Well, I am a graduate of the University of California in petroleum technology and I have specialized in it.

Q. You are familiar then, with the fact, Mr. Clements, that steel that is cemented in a well is referred to in the oil industry as casing, are you not?

A. Not when you take that pipe out and salvage it and sell it on the street for pipe line service, which we intended to do in connection with this pipe. If it is not casing that you could use today in modern drilling operations——

Q. I am not talking about what its use would be after it had been removed but, when it is cemented in the well, it is referred to in the oil industry as casing, is it not?

A. We think of it in terms of the purpose for which we are going to apply it after we get it.

Q. I am not asking you that. I am asking you if, when it is cemented in the well, it is referred to in the oil industry as casing.

A. Pipe in the well is referred to in the oil industry as casing; yes.

Q. You mentioned at the beginning of this discussion [135] that your transaction with Mr. Ferer was that you were to get one-third of the net profits, is that correct?      A. That is correct.

Q. Has there been any accounting of the net profits as yet?

A. There have been no net profits yet. It has all been net loss so far.

(Deposition of T. H. Clements.)

Q. The work is not as yet concluded, is it?

A. We haven't been able to finish cleaning up the property because of the fire warden's stipulations.

Q. And if at the conclusion of the work there is a net profit, you still expect to get one-third of that, is that correct?      A. Surely.

Mr. Paradise: I think that is all.

Cross-Examination.

Q. By Mr. Krasne: Before you took Mr. Ferer out to the property in question for the first time, after you had discussed the dismantling of this field with Mr. Davis and with Mr. McGahan, did you intend that in having Mr. Ferer make an offer for the property the offer would embrace the pipe in the wells as well as the other producing and refining equipment on the property?

A. Yes.

Q. Did Mr. Davis or Mr. McGahan or any other official [136] or employee of Richfield Oil Corporation ever tell you, prior to the execution of the contract, that Richfield Oil Corporation did not intend to sell the pipe in the oil wells on the property?      A. No.

Q. If I understand your answers to Mr. Paradise's questions, the question of the pipe in the wells was never specifically discussed at any time prior to the execution of the contract by you or by anyone in your presence with the Richfield people, is that correct?

A. No; it wasn't.

Q. Prior to your taking Mr. Ferer to the property and prior to the execution of the contract, did Mr. Davis or Mr. McGahan or any other official or employee of

(Deposition of T. H. Clements.)

the Richfield Oil Corporation ever tell you that they intended to sell only such producing and refining equipment as was upon the surface of the property up there?

A. No.

Q. Did you have any knowledge from any source whatsoever that it was the intention of the Richfield Oil Corporation in signing this contract not to include in the conveyance to Aaron Ferer & Sons the pipe in the wells on the property?

A. No.

Q. Did you suspect that the Richfield Oil Corporation did not intend to sell by that contract the pipe in the oil [137] wells?

A. No.

Q. Prior to the execution of the contract, did you have any knowledge from any source whatsoever that Richfield Oil Corporation intended to sell to Aaron Ferer & Sons only such producing and refining equipment as was upon the surface of the land on their property?

A. No.

Q. Did you suspect that Richfield Oil Corporation in making the sale to Aaron Ferer & Sons, intended that there should be included in the sale only such producing and refining equipment as was upon the surface of the land out there?

A. No.

Q. Was there ever any oral contract entered into between Richfield Oil Corporation as seller and yourself or Richfield Oil Company and Aaron Ferer & Sons, in your presence, by the terms of which oral agreement the pipe in the oil wells—I will strike that question. The only contract that you have any knowledge of between Richfield Oil Corporation and Aaron Ferer & Sons relating to the sale by Richfield Oil Corporation and the purchase by

(Deposition of T. H. Clements.)

Aaron Ferer & Sons of producing and refinery equipment and facilities on the Casmalia property is the contract expressed in the written contract dated January 17, 1941, isn't that a fact?

A. Could I have the first part of that question read?  
[138]

(Question read by notary.)

Mr. Paradise: I object to that as calling for a legal conclusion of the witness.

Q. By Mr. Krasne: Will you answer the question?

A. Yes.

Q. Were you ever present at the making of any oral contract between Richfield Oil Corporation and Aaron Ferer & Sons with respect to the producing and refining equipment on the Casmalia property?

Mr. Paradise: The same objection.

A. Yes; I was present at a conference at which there was an oral stipulation, which was followed up with a typewritten memorandum, which was to be held as the context of the contract prior to the drawing up and execution of the main contract.

Q. By Mr. Krasne: Were you ever present at any meeting between Aaron Ferer & Sons and any representative or employee of Richfield Oil Corporation at which it was agreed by the parties that the pipe in the oil wells was not to be sold by Richfield Oil Corporation to Aaron Ferer & Sons?

Mr. Paradise: I object to that as calling for the conclusion of the witness on a legal matter of the interpretation of a contract.     A. No.

(Deposition of T. H. Clements.)

Q. By Mr. Krasne: Prior to the execution of the written contract dated January 17, 1941, did you ever hear [139] any representative of Richfield Oil Corporation state to Aaron Ferer & Sons or any representative thereof that the pipe in the oil wells was not being sold to Aaron Ferer & Sons? A. No.

Q. Did you ever hear Mr. Morris Ferer or any other representative of Aaron Ferer & Sons tell any representative of Richfield Oil Corporation that they were not purchasing the pipe in the oil wells? A. No.

Q. Was it always your understanding and belief, prior to the execution of the written contract dated January 17, 1941, that Aaron Ferer & Sons was purchasing and Richfield Oil Corporation was selling all producing and refining equipment on the Casmalia property, of every kind and nature, except for the items that were specifically excluded in the written contract? A. Yes.

Q. Mr. Paradise on numerous occasions during the taking of your deposition here referred to estimates that were made by yourself and Mr. Ferer the first time you took Mr. Ferer up to the Casmalia property. Were those so-called estimates precise estimates or were they in the nature of guesses?

A. They were very definitely guesses.

Q. In other words, so that the record will be clear, [140] you and Mr. Ferer went over the property and more or less guessed what you might be able to salvage from this, that or the other item that you understood you were purchasing from Richfield Oil Corporation, isn't that correct?

(Deposition of T. H. Clements.)

Mr. Paradise: I object to the question as calling for a guess made by Mr. Ferer and calling for the conclusion of the witness.

A. Yes.

Q. By Mr. Krasne: So that the record will also be clear, let's see if we can trace chronologically the order of events that led up to the execution of the written contract dated January 17, 1941. If I understood your testimony in response to Mr. Paradise's questions, you had on one or more occasions considerably before the contract was signed asked the salvage department of Richfield Oil Corporation when they expected to dismantle the Casmalia field, is that right? A. Correct.

Q. And Mr. McGahan and I believe you also said Mr. Davis told you when you made those inquiries in the early stages that they had received no instructions as yet to have the field salvaged, is that right?

A. That is correct.

Q. Then, some time in the latter part of 1940, Mr. Davis told you to get in touch with Mr. McGahan; that he felt that the company was now ready to dispose of the [141] equipment on the property; is that right?

A. That is correct.

Q. And you went over to see Mr. McGahan in his Long Beach office? A. Yes.

Q. And they asked Mr. McGahan if he had an inventory of what they wanted to sell? A. Yes.

Q. And Mr. McGahan told you that he had no inventory, that there was no inventory, of the equipment on that property in existence, is that right?

(Deposition of T. H. Clements.)

A. That is right.

Q. Did he tell you whether or not the company desired to sell everything on the property or just part of the equipment on the property?

A. He said that they only wanted to sell part of the material on the property and he showed me the excluded list of items.

Q. Were the items on the list which he showed you substantially the same items as were set up in the written contract as excluded items? A. That is correct.

Q. Except for that, did he tell you that the company would entertain an offer for everything else on the property? A. Yes.

Q. It was after that time early in December, 1940, [142] that you tried to interest Mr. Ferer in making a bid for the equipment there, is that right?

A. Yes; following that conversation with Mr. McGahan.

Q. And you took Mr. Ferer out to the property for the first time early in December, 1940?

A. That is correct.

Q. And, after spending the better part of a day there with Mr. Ferer, Mr. Ferer agreed to submit an offer to the Richfield Oil Corporation, did he?

A. That is correct.

Mr. Paradise: Mr. Krasne, could we have more testimony by the witness rather than by yourself?

Mr. Krasne: I am trying to clarify much of the generality of the previous examination. I don't think I am

(Deposition of T. H. Clements.)

putting any words in the witness's mouth and I think I am only crystallizing the record as to things he has already testified to.

Q. Do you know whether or not Aaron Ferer & Sons did make an offer to Richfield Oil Corporation?

A. They did. I was present and helped draw up the letter.

Q. When would you say that was approximately?

A. Well, somewhere in the early part of December; I would say between the 1st and the 15th, although I don't remember the exact date.

Q. And that was in the form of a letter sent to [143] Richfield Oil Corporation?

A. Yes; attention of Mr. Davis if I remember or it might have been attention of Mr. McGahan but I think it went to Mr. Davis.

Q. Then, what was the next thing that happened, if you know?

A. Nothing happened until Mr. Davis called me up and told us that our bid had been accepted.

Q. When was that?

A. Just after January 1st. I think it was the 2nd or 3rd. It was in the very early part of January.

Q. January, what year?                      A. 1941.

Q. What was the next thing that happened, if you remember?

A. I think that Mr. Davis, as I remember, wrote a letter to Aaron Ferer confirming the telephone conversation, saying the proposal had been accepted, and would



(Deposition of T. H. Clements.)

Aaron Ferer & Sons put up a check, I think, in the amount of \$10,000 prior to a certain date about a week hence. In other words, between the 8th and the 10th day of January that check was supposed to be in.

Q. Do you know whether or not Aaron Ferer & Sons did give Richfield Oil Corporation a check some time early in January, 1941?

A. Yes, Mr. Morris Ferer prepared such a check, which [144] I believe was a cashier's check, and, as I recall, I was with him when we came up and gave it to Mr. Harold Davis.

Q. In your earlier testimony I believe you said that on one occasion, in your presence and while you were in Mr. Davis's office, he called Mr. Paradise to see if he could arrange a meeting for the purpose of drawing a contract, and that Mr. Paradise was very busy or not available. Was that your testimony?

A. I believe it was.

Q. You believe that was your testimony?

A. Yes. I believe that Mr. Paradise was busy at the time. I don't remember him coming down but he may have.

Q. Would you say that the occasion when that telephone call was made was the day when you came up with Mr. Ferer and Mr. Ferer gave the check to Richfield Oil Corporation?

A. Yes.

Q. About January 8, 1941?

A. Yes; about that time.

Q. Then the next step that occurred was when you had the meeting in Mr. Paradise's office and he had a contract prepared, is that correct?

(Deposition of T. H. Clements.)

A. Well, no. At this previous meeting that you just mentioned, when Mr. Ferer gave the check over, as I recall, Mr. Davis said, "Well, we will note down our understanding of what is to go for this consideration", and I believe that [145] he turned around to the typewriter and at that time knocked off a memorandum and gave it to Mr. Ferer, outlining what was to be included in the contract which Mr. Paradise was to draw.

Q. I show you what purports to be a typed memorandum bearing the heading, "Sale of Material and Equipment at Casmalia", and appearing to have the initials in the lower left-hand corner of the dictator, "H. E. D." and of the stenographer "ad", and ask you if that is the memorandum which Mr. Davis handed you on that occasion. For the purpose of further identification, let me say that this memorandum bears the date January 8, 1941 in the lower left-hand corner.

A. Yes; that is right.

Mr. Krasne: I will ask the reporter, please, if he will be good enough to mark this document for identification for future reference in this matter as Plaintiff's Exhibit 1.

Q. At the time that Mr. Davis handed this paper to yourself or Mr. Ferer in your presence, as the case may have been, did you notice in it this clause, "Everything will be sold to the above with the exception of the following"? Did you see that clause?      A. Yes.

Q. And at the time this memorandum was handed to you, was it your understanding that the deal between Aaron Ferer & Sons and Richfield Oil Corporation was that Aaron Ferer [146] & Sons were buying everything

(Deposition of T. H. Clements.)

on the property by way of production or refinery equipment or facilities except the items specifically excluded on this memorandum?      A. Yes.

Q. Did I understand you to say that Mr. Davis told you and Mr. Ferer at the time he handed you this memorandum that the terms thereof were to be the basis of the contract which Mr. Paradise was to draw up?

A. Yes.

Q. And then you had this meeting in Mr. Paradise's office somewhere, I think you said, around the middle of January and just before the contract was actually signed?

A. I believe it was around the 15th or 14th or something like that.

Q. And that was the occasion, was it, when Mr. Paradise distributed a copy of the proposed contract to each person present?      A. Yes.

Q. And it was on this occasion, was it, that Mr. Ferer stated that it was his understanding that the contract was to have included everything and that one of the provisions which Mr. Paradise had included in the contract might appear to be ambiguous and that he wanted the contract to say "all metal and all lumber" so that he would know that everything was included?

A. Yes, sir. [147]

Q. And Mr. Davis and Mr. Paradise said that they would be agreeable to the making of that change at that meeting, is that right?      A. Yes, sir.

Q. And the next thing that happened that you know of was that contracts were mailed to Aaron Ferer & Sons for signature and that the contracts included the change which Mr. Ferer had asked for, is that right?

(Deposition of T. H. Clements.)

A. Yes, sir.

Q. And, as far as you know, the contracts were signed and that was it?     A. Yes, sir.

Q. You said in response to one of Mr. Paradise's questions that you had never made any inquiry from any of the Richfield representatives as to how many wells were located on the property or how much casing there was in the wells, is that correct?

A. That is correct.

Q. Did you make any inquiry of any of the Richfield Oil Company representatives as to how much of any other item of producing or refining equipment there was on the property?     A. No.

Q. In other words, you and Mr. Ferer went out to the property to figure for yourselves what in your best judgment could be salvaged from the equipment, how much it would cost to salvage it and what the potential profits or losses would be, is that right? [148]

A. Yes, sir.

Mr. Krasne: That is all.

Redirect Examination.

Q. By Mr. Paradise: I don't recall, Mr. Clements, whether I asked you if you ever inquired of the Division of Oil and Gas at any time prior to the date of the contract what the Division's requirements would be with respect to your proposed abandonment of those wells on the Richfield property.     A. I never so inquired.

Q. You never so inquired?     A. No.

Mr. Paradise: That is all.

(Deposition of T. H. Clements.)

Recross-Examination.

Q. By Mr. Krasne: For the purpose of the type of estimate that you and Mr. Ferer were making and to arrive at a figure that Mr. Ferer would be willing to offer, did you feel that you knew enough about the abandonment of oil wells to make a near enough estimate for yourself as to what the cost of abandonment would be?

A. Yes.

Q. Did you feel at that time that your experience in the oil business was sufficient for you to hazard a pretty fair guess as to what would be required by way of abandonment [149] of the wells? A. Yes.

Mr. Paradise: I submit those questions are all very leading and suggestive. I would much prefer to have the testimony of the witness.

Mr. Krasne: I will say for the purpose of the record that counsel's point would be well taken except in this type of action, where counsel by his pleadings has raised the question of the plaintiff's intentions and their frame of mind and their suspicions as to the defendant's intentions, it makes it necessary to inquire into what this plaintiff actually did have in mind.

Mr. Paradise: But it is still preferable to have the witness's testimony as to what his intentions were.

Mr. Krasne: That is all.

Mr. Paradise: Before we conclude this deposition, when will Mr. Clements be available for the purpose of reading over and signing his deposition in order that it may be filed in court as soon as possible for the purpose of the hearing on the motion for a summary judgment?

(Deposition of T. H. Clements.)

Mr. Krasne: I will have it read immediately and, assuming that it will be correct, I will have it signed almost immediately upon receipt of it from the notary.

Mr. Paradise: May it be stipulated, then, Mr. Krasne, that, after the witness has read the same, that any corrections he wishes to make will be made in the presence of Mr. [150] Reynolds, the notary, and there signed and verified?

Mr. Krasne: Yes. In other words, we stipulate, if there are no corrections, it may be signed before any notary, is that right?

Mr. Paradise: That is satisfactory.

Mr. Krasne: And only if corrections are made is it to be signed in the presence of Mr. Reynolds?

Mr. Paradise: If corrections are to be made, those changes are to be made in the presence of Mr. Reynolds and then signed and verified.

T. H. CLEMENTS.

Subscribed and sworn to before me this 12th day of February, 1942.

ROSS REYNOLDS,

Notary Public in and for the  
County of Los Angeles, State of  
California.

(By agreement between counsel for the respective parties, an adjournment was taken at the hour of 4:50 p. m. to the hour of 10:30 a. m. on Saturday, February 7, 1942, at the same place.) [151]

(Met pursuant to adjournment on Saturday, February 7, 1942, at the hour of 10:30 a. m., at the same place, with the same parties present as last before mentioned.)

MORRIS FERER,

a witness called by the defendant, being first duly sworn,  
testified as follows:

Direct Examination.

Q. By Mr. Paradise: What is your business address,  
Mr. Ferer?

A. 5585 East Sixty-first Street, Los Angeles.

Q. And the business is operated under the name of  
Aaron Ferer & Sons, is that correct?

A. That is correct.

Q. What is your status in connection with that business?

A. I am a member of the copartnership and general  
manager.

Q. You have charge of the operation of the business  
and the determination of its business problems?

A. I do.

Q. And the other copartners I think are stated in the  
complaint as Esther Peggy Ferer and Robert Irving  
Ferer?

A. That is correct.

Q. What is the nature of that business?

A. We do a scrap metal business and usable machinery [152] and equipment and so forth.

Q. Do you buy equipment solely for the purpose of  
resale in the ordinary course of business?

A. Yes; we do.

Q. Do you have a warehouse? A. Yes.

Mr. Paradise: The statement that I made yesterday  
concerning the stipulation between Mr. Krasne and my-

(Deposition of Morris Ferer.)

self with respect to the production of documents under the order of the court is the same with respect to Mr. Ferer as with respect to Mr. Clements, is it not?

Mr. Krasne: So stipulated.

Q. By Mr. Paradise: Have you seen, Mr. Ferer, the list of documents specified in the order of Judge Hollzer, dated February 4, 1942, which you were required to bring to this deposition?

A. My attorney told me what documents he wanted and he has all the documents that we have pertaining to this transaction.

Q. He has all documents?

A. He has whatever documents there were.

Q. The first item of the court order is all written memoranda, records, tabulations, estimates and correspondence, prepared during the years 1940 and '41, by Morris Ferer, T. H. Clements, Aaron Ferer & Sons, or by any of their employees or agents, pertaining to the purchase by [153] Aaron Ferer & Sons of facilities and equipment from Richfield Oil Corporation, or pertaining to the facilities and equipment to be purchased by Aaron Ferer & Sons from Richfield Oil Corporation. Have you brought to this deposition any documents or memoranda or any of the other items that are referred to in that order?

A. There were none.

Q. There were none?      A. No, sir.

Q. Have you given to Mr. Krasne any of such items?

A. No.

Q. There were no such documents or items contained in the documents which you furnished to Mr. Krasne, is that correct?

A. That is correct.



(Deposition of Morris Ferer.)

Mr. Krasne: So the record will be clear, I presume Mr. Paradise is directing attention to any records or memoranda between Mr. Clements and the company or anyone connected with the company and not to any correspondence between Richfield and Aaron Ferer & Sons.

Mr. Paradise: That is correct.

A. That is correct; there were none.

Q. In other words, my question is directed to any and all memoranda, records, tabulations, estimates and correspondence, other than correspondence directly between Aaron Ferer & Sons and Richfield. [154]

A. That is correct.

Q. Do I understand, then, Mr. Ferer, that, at and prior to the time this contract was signed which is dated January 17, 1941, there were no memoranda or records or tabulations or estimates of any of the equipment or facilities which you expected to purchase under this contract? A. No; there were none.

Q. Were there any made at the time which have since been destroyed? A. No, sir.

Q. Your estimates were made solely on the basis of calculation in your mind rather than by the preparation of any tabulations or calculations on paper?

A. Well, mostly that way. We might have made scribbled figures on scratch paper which we didn't retain at the time. I went over the plant and we might have picked up a piece of scratch paper. The reason for that was that this particular job, if you want me to explain it—

Q. Yes; you are entitled to explain.

(Deposition of Morris Ferer.)

A. The reason for that was this particular job was such a hit and miss job that we couldn't seem to get much information from Richfield. We had to do so much guessing and so much of it was underground and it was an unknown quantity both as to labor and as to the tonnage of material that would be there. It was all strictly a question of guess. [155]

Q. You say that you were unable to obtain sufficient information from Richfield. What inquiries did you make of Richfield for information which you were unable to get?

A. At one time I spoke to Mr. McGahan, who I presume had charge of your salvage department, and asked him if there was any information regarding this particular job and he said no, that—I don't remember the exact words but he said that they didn't have any inventory and that they couldn't give us information; that we were to look at it ourselves.

Q. When did that conversation take place?

A. Well, some time prior to our making out a bid. I don't remember the exact date but in and around that time.

Q. Within a few weeks of that time?

A. No; it wouldn't be a few weeks. It would probably be a few days.

Q. Where did that conversation take place?

A. I think at Long Beach, at your office out there.

Q. At the Richfield office in Long Beach?

A. Yes. Or it might have taken place in a phone conversation. I am not definite about that.

(Deposition of Morris Ferer.)

Q. What was your request to Mr. McGahan? Was it merely for an inventory?

A. For an inventory and if he could enlighten me any on what might be out there.

Q. What was Mr. McGahan's answer? Was it simply that [156] he had no inventory?

A. That he had no inventory and that they couldn't give us any information on it and that it was up to us to look at it and buy what we were buying or words to that effect. That isn't the exacting wording of this but that is the trend of thought.

Q. Did he refuse to give you any information?

A. No; it wasn't a question of refusal. It was just a matter of conversation. And whether he had instructions or whether that was his own opinion, I don't know. That was the general conversation.

Q. Wasn't his answer simply that there was no current inventory that had been prepared, with the items of facilities and equipment that were up there?

A. Well, that might have been his answer but I also asked him if he could give some idea of what he thought and he said he couldn't.

Q. Did you ask Mr. McGahan what the tonnage of the facilities and equipment which were to be sold consisted of?

A. I don't remember. I might and I might not have. But, in any event, he didn't give me any information.

Q. That is what you were interested in primarily, was it not, was the tonnage?

(Deposition of Morris Ferer.)

A. Well, that was what I was interested in and any other information that I could get.

Q. But you didn't ask him specifically as to what his [157] estimate of the tonnage was, is that correct?

A. I don't think so.

Q. Did you ask him for anything other than an inventory?

A. Only what other information he could give me.

Q. What types of information did you ask for?

A. Well, just general. I wanted to be enlightened as much as I could and I didn't get any information.

Q. Did Mr. McGahan refuse to answer any of your questions?

A. Oh, no; it wasn't a question of refusal because, if he had—it was merely that I felt that he wasn't familiar with it or didn't know about it or whatever that might be and that it was up to us to go and formulate our own conclusions.

Q. Did you ask him any questions as to the condition of the equipment?      A. No.

Q. Did you ask him as to the tonnage?

A. I might have asked him that. I don't know. It would be a logical question to ask him.

Q. Do you recall whether he stated what the tonnage was?

A. No; I can tell you definitely he didn't.

Q. Did he state he didn't know what the tonnage was?

A. That is right. He stated that he didn't know and that he didn't have any information on it. I think he

(Deposition of Morris Ferer.)

[158] stated that their records were not clear or up to date. And again, as I stated before, he said it was up to us to go out there and check it ourselves.

Q. Did you ask at that conversation for any other specific information? A. I don't think so.

Q. If Mr. McGahan was unable to supply you with the information that you wanted, did you make a request to any other Richfield representative or employee, either at that time or any other time, for the information that you desired? A. No, sir.

Q. Returning to the order of the court, the second item describing the documents to be brought to this deposition is as follows: All written memoranda, records, tabulations, estimates and correspondence, prepared during the years 1940 and 1941, by Morris Ferer, T. H. Clements and Aaron Ferer & Sons, or by any of their employees or agents, and used by them in estimating the price of \$22,000 offered to Richfield Oil Corporation by Aaron Ferer & Sons as the purchase price for such *facilities* and equipment. Have you brought to this deposition any documents as required under that provision of the order? A. There were none.

Q. There were none? A. No, sir.

Q. There were none prepared? [159]

A. There were none prepared.

Q. In other words, I take it that the documents that you have referred to, that you have given to Mr. Krasne, therefore, do not include any documents of this nature?

A. That is correct.

(Deposition of Morris Ferer.)

Q. The third item of the order of court is copies of all logs and histories and drillers' reports or records of or pertaining to any of the wells located upon the land of Richfield Oil Corporation described in the contract, dated January 17, 1941, attached to the amended complaint herein. You listened to the deposition of Mr. Clements and I presume you heard his answers with respect to those logs and histories?      A. Yes.

Q. Are all of the logs and histories and drillers' reports and records pertaining to those wells in Mr. Clements' possession?      A. As far as I know, they are.

Q. Do you have any of them?      A. No, sir.

Q. So neither you nor Aaron Ferer & Sons have any documents of the nature that were requested under that paragraph of the order, is that correct?

A. That is correct.

Q. When did you first learn, Mr. Ferer, of the fact that Richfield proposed to sell certain equipment and [160] facilities from its Casmalia property?

A. The latter part of November or the very early part of December. I don't remember the exact date.

Q. Did you receive that information from some Richfield employee or representative?      A. No, sir.

Q. From whom did you receive it?

A. Mr. Clements.

Q. Were you at that time familiar with the Casmalia property?      A. No, sir.

Q. You had never seen the same?      A. No, sir.

(Deposition of Morris Ferer.)

Q. Did you discuss its purchase from Richfield with any Richfield representative or employee prior to the time when you and Mr. Clements visited the property?

A. No, sir.

Q. What was the date of that visit?

A. Outside of that question of the conversation with Mr. McGahan, which I don't remember was either right before or after I was up to the property the first time, that is, I don't remember whether it was before or after I was up at the property for the first time.

Q. Can you fix the date of your first visit to the Casmalia property, the Richfield property, with Mr. Clements?

A. Not the exact date but it was the early part [162] of December, 1940.

Q. Was that shortly after the time when Mr. Clements first told you of this contemplated purchase?

A. Yes, sir.

Q. Did you make any arrangement with Mr. Clements at or about that same time with respect to Mr. Clements' interest in this transaction?

A. Well, in that period of our negotiations we made the arrangements. But I again can't fix the exact time but we had numerous conversations and the arrangements were made during those negotiations.

Q. Did you make a written agreement with Mr. Clements concerning that?

A. No, sir.

Q. What was the nature of the oral agreement?

(Deposition of Morris Ferer.)

A. He was to get  $33\frac{1}{3}$  per cent of the net profits and he was supposed to stand  $33\frac{1}{3}$  per cent of any of the losses.

Q. Was he to furnish any of the labor or equipment or services that were necessary to perform Aaron Ferer's obligations under its purchase arrangement with Richfield?

A. No, sir. He may have furnished some small amount of equipment but it was our understanding that we were to do all of the furnishing of the equipment and funds and everything else that was necessary. His duty was to supervise and take charge and handle the job or have one of his key [162] men handle the job. That was about all his duties were and, of course, make sales, being that he was also in that end of the business, that is, makes sales of some of the material.

Q. Did your agreement contemplate that he should have the right to make sales of the salvaged equipment or that the sales should solely be made by you or were the sales to be made by both of you jointly?

A. Our agreement was that the sales could be made jointly but that, if there was any important sale that ran into any amount of money, he would consult with me before he actually closed the deal. But on small sales or numerous sales I felt enough confidence in his ability to let him go ahead. All of the material was billed through our company and always handled through our company. He merely acted as our agent, you might say.

Q. Do I understand, then, that Mr. Clements merely negotiated or that you contemplated that Mr. Clements would merely negotiate sales of the equipment which you



(Deposition of Morris Ferer.)

were going to salvage but that the actual sale would be made by Aaron Ferer & Sons to the prospective purchaser?

A. Well, not necessarily. He would make the sale and ship the material out.

Q. Under your name? A. Under our name.

Q. That examination of the property which you made with Mr. Clements you say occurred some time during December of 1940? A. Yes; the early part.

Q. Was there anyone else present at that examination besides your and Mr. Clements?

A. No; not outside of your man Duncan walking over to what they called the refinery portion of the property and showing us certain items that were excepted and also showing us in his home the map; that is all. We went over the property ourselves, Mr. Clements and I.

Q. Mr. Duncan was the only Richfield man on the property, was he not?

A. As far as I know. He is the only one I remember seeing.

Q. Do you know his status?

A. Well, no. As I understand, he was formerly a superintendent or something and acted as a watchman or something. I don't know. We didn't go into detail about that. He was only with us a very short while.

Q. The property was not then being operated by Richfield as a refinery or for any other purpose, is that correct?

(Deposition of Morris Ferer.)

A. As far as my limited knowledge would go, I would say no.

Q. You say Mr. Duncan took you over to the refinery end of the property and pointed out certain items which were to be excluded?

A. That is correct. [164]

Q. What items did he point out?

A. Well, he pointed out some stills and some sheets and that is about all I can remember, stills and sheets.

Q. When you say sheets, will you describe those?

A. There were some sheets laying around. They looked like they had been stills or something that had been cut open or ripped up and the rivets taken out and they were pretty heavy sheets. I didn't pay any particular attention to them, although I glanced at them. As long as we knew we were not to get them, I just paid no attention to them. And I think he showed us some pipe out of a heater or something that he also told us a certain portion of went but that they had sold it, I think, to O. C. Fields, and that they had taken some of it and they were to get a certain amount more. He was a little indefinite as to the exact amount. And that was about all.

Q. As to the exact amount of what?

A. The number of pipes or pipe that this company was to get out of this particular coil. There was a big coil of pipe there out of a condenser or something. Apparently your company had sold some of those to this O. C. Fields Company.

(Deposition of Morris Ferer.)

Q. The matter that he was indefinite about was as to the quantity that had been sold to the Casmite Company or the O. C. Fields Company?

A. Yes; that is correct. [165]

Q. Did Mr. Duncan point out to you the gas lines running to certain wells which were to be excluded?

A. He did not.

Q. He did not? A. No, sir.

Q. Did he point out any other items which were to be excluded?

A. Well, he couldn't have any items of importance or I think I would have remembered them and I don't remember any.

Q. Did either you or Mr. Clements ask Mr. Duncan for a map of the property?

A. Yes; we did. When we first came onto the property, we went up to his house and he showed us a map there of the property.

Q. Did you know that Richfield had three separate parcels of land up there? A. No, sir.

Q. Did you ask him for a map as to any particular parcel? A. No, sir.

Q. Did he know what particular parcel you were interested in?

A. That I can't answer. He apparently knew they were going to sell all this material up there and I presume that he showed us the map pertaining to that. I don't know.

(Deposition of Morris Ferer.)

Q. What were your conversations with Mr. Duncan concerning the map? [166]

A. Well, merely that we were up there to look over the property with the thought of purchasing it and that we understood he had a map. And he said, "That is correct." And it was a great big map with a lot of lines on it and a lot of markings on it. I am not an expert reader of maps, I can't tell you right now. And we looked it over and got sort of a bearing and then went out to look over the property.

Q. How much of the time that you spent up there did Mr. Duncan spend with you?

A. Oh, I would say possibly a half hour or something like that.

Q. And how much longer did you stay?

A. We stayed there practically the whole day.

Q. Will you describe what examination you made of the property, you and Mr. Clements?

A. Well, we went over to the refinery. And I have my own way of appraising things. While I never appraised a refinery before, I made mental notes and figures and wrote down figures to get the approximate tonnage and gathered what I could with what information Clements gave me, and we covered the entire property not in minute detail because it was very hard to do that. As I say, he would say, "Here is a pipe line running from here over here and here is an oil well here." And, of course, I couldn't see a thing because it was underneath the ground.

(Deposition of Morris Ferer.)

Q. What was underneath the ground? [167]

A. I presume the pipe lines is what he talked about and the wells.

Q. The pipe lines were exposed on the surface for a good portion of their surface, were they not?

A. Some were exposed but the major proportion of the material was underground.

Q. When you say the material, you mean the pipe lines, is that correct?

A. I mean the pipe lines; yes, sir.

Q. They were in trenches, were they not, that is, the pipe lines?

A. No, sir. They were under the ground, covered completely. There may have been some in trenches but, as I say, the greatest portion of them were covered completely under the ground.

Q. When you say covered completely, you mean that portion of the lines which were underground but a portion of the lines were exposed on the surface, were they not?

A. Oh, sure; there would be lines coming up out of the ground, where we could see that they went into the ground. They were crisscrossed all over the property.

Q. With respect to the refinery equipment, Mr. Ferer, how did you go about estimating the tonnage of the facilities which you expected to remove?

A. Well, I would look at a condenser and I would figure out that there was 25 tons there and 25 tons [168]

(Deposition of Morris Ferer.)

here and so many tons there and gathered a lump figure and then went on in the same way all through the rest of the examination. We examined the boilers and we looked at the boiler houses and took into consideration it was quite a job removing them. There was a lot of brick and a lot of debris and there were some houses that some of these boilers were in. And, when we got through, we had a rough idea of what we thought would be there but we realized that this job was so indefinite, due to the fact that so much of this material was concealed or underground, that we just had to guess. It didn't mean a thing. Our figures didn't really mean a thing.

Q. When you say so much of this material was underground, what material are you talking about?

A. I am talking about the pipe, the pipe lines, the wells and the lines that were in the other pipe lines. We could see or I could see at the end of a line that would go into the ground that there was pipe inside of pipe. That is what I have reference to.

Q. What estimate did you make at that time of the tonnage of the refinery facilities?

A. I couldn't honestly answer that question because, as I tell you, we lumped the whole thing at that time and I didn't make any particular breakdown. I made a breakdown at the time I was appraising it to gather my lump sum or to gather my lump figure but, as I tell you, it was so indefinite that I realized that it was just [169] foolishness to even try to appraise any sensible tonnage be-

(Deposition of Morris Ferer.)

cause it was a job that was unusual, and it was just a matter of taking a chance on buying this material and hoping that what we thought was there would be there.

Q. How long have you been in this business, Mr. Ferer, of salvaging equipment and removing it and reselling it? A. Oh, 25 years or more.

Q. And during the course of that time you have made appraisals of various jobs, I presume?

A. Oh, lots of jobs but never one like this.

Q. Wherein does this one differ from the others?

A. Because on other jobs the material is in front of you and you can either get figures on the machinery or whatever may be there or you can estimate it. You may be off on your estimation either in your favor or against yourself but at least you get an idea.

Q. It is important to you, then, to know within reasonable limits the estimated tonnage which you expect to take out, is that correct?

A. Oh, yes; it is important. But, as I say, in making these deals there is nothing sure fire about them. We take a chance sometimes; lots of times. The question of labor was indefinite on this and the question of hauling was indefinite on this. The whole job was of an indefinite quantity.

Q. What information would you have needed to [170] make a more exact determination of the tonnage which you expected to take off?

(Deposition of Morris Ferer.)

A. The only information, if I felt that Richfield would keep an up to date set of books, was an inventory of all their plants so they could say to me, "We have so much," and that a company like Richfield wouldn't misrepresent—

Q. I don't understand your answer to that. Does your answer imply that Richfield did misrepresent?

A. No. You didn't let me finish.

Q. I am sorry. Go ahead.

A. Will you please read the question to me?

(Question read by reporter.)

A. And, if they had that information, I would have been guided a great deal by that.

Q. When you discussed with Mr. McGahan the question of the inventory, which discussion I understood you to say you don't recall whether it was before or after your inspection of the property,—

A. No, sir.

Q. —what type of an inventory did you ask him for?

A. I don't think I asked him for any type of inventory. I wouldn't know. I asked him if they knew what they had up there and if they could enlighten me to help us out. And I figured, if they had it in detailed form as a good many large companies such as yours would have, we could figure it. In most cases they have each piece of equipment and each [171] item itemized so we can check against that and they have weights and they have the number of miles of pipe lines and the number of feet in the ground and in the pipe, and all of those things would help out and we could check in an



(Deposition of Morris Ferer.)

easier manner in that way. But, as I stated, his answer was that it was up to us to look it over ourselves; that they didn't have any information on it.

Q. Did he tell you at that time that the property had not been in operation for a period of something over 15 years and that was the reason he had no inventory?

A. No; he didn't give me any explanation.

Q. You have mentioned two items which you said were unknown quantities, that is to say, unknown from the standpoint of the tonnage involved. One was the pipe lines and the second was the casing in the wells, is that correct?

A. The tonnage or footage of the pipe lines and the pipe or casing in the wells was unknown.

Q. That was completely unknown to you, is that correct?

A. It was completely unknown to me except that I took it for granted that Mr. Clements knew his business.

Mr. Paradise: I move to strike that portion of the answer as to what Mr. Ferer took for granted.

Mr. Krasne: Subject to counsel's motion, you may, nevertheless, give your answer for the purpose of the record, Mr. Ferer.

A. Mr. Clements told me that the wells should [172] produce a minimum of 50,000 feet, with a good possibility of their having 100,000 feet; and I, of course, took that into consideration in my figures.

Mr. Paradise: I move to strike the witness' answer as to his conversation with Mr. Clements as being hearsay in so far as the defendant is concerned.

(Deposition of Morris Ferer.)

Q. Did you ever inquire of Mr. McGahan as to the length of the pipe lines or the approximate length of the pipe lines that were on the property?

A. No, sir; I made no inquiries other than what I have already mentioned. And I can also tell you flatly now that I had no conversations and no contact and no talks with any one of the Richfield Company in any way, shape or manner, outside of the conversations that I have already mentioned with Mr. Duncan and Mr. McGahan, up until the time of the closing of the deal with Mr. Davis.

Q. Have you any way of refreshing your recollection as to whether the conversation with Mr. McGahan that you mentioned, in the Richfield Long Beach office, occurred before or after your examination of the property?

A. Let me correct you. As I stated before, I am not sure that the conversation occurred at Mr. McGahan's office in Long Beach or whether it was over the telephone. I am not clear on that.

Q. Had you ever met Mr. McGahan before?

A. I think so. I think I met him there on some [173] other salvage that we had purchased or were going to purchase, that came out of your store yards or whatever you call them.

Mr. Paradise: I asked a question which I think you failed to answer. Will you read it, Mr. Reporter?

(Question read by notary.)

A. No, sir.

Q. At that time did you ask Mr. McGahan as to the extent of the pipe lines?

(Deposition of Morris Ferer.)

A. I don't think that I narrowed it down to that. I have repeated to you the total of the conversation as I remember it to date.

Q. Then, I take it you also failed to inquire of Mr. McGahan about the size and weight of the various pipe lines, including the steam lines that were used in connection with those lines?

A. Well, when he told me that he had no information, there was no need of my trying to quiz him. I didn't want to antagonize him or anything else. I don't remember asking him anything outside of the conversation that I have already repeated to you.

Q. Did Mr. McGahan say he had no information of any nature about the equipment?

A. I wouldn't say it in those words. I don't remember the exact words. I know Mr. McGahan's answer to me was negative and that is about all I can tell you.

Q. Did you inquire of Mr. McGahan as to the sizes and [174] weights and quantities of casing in the wells?

A. No, sir.

Q. Was there any discussion with Mr. McGahan at all about the wells? A. No, sir.

Q. Were either the wells or the casing mentioned in that discussion? A. No, sir.

Q. When you failed to get that information from Mr. McGahan, that is to say, the information that you asked him for, did you make any inquiry of any other representative or employee of the Richfield Oil Corporation about it?

(Deposition of Morris Ferer.)

A. No. As I stated before, I can clear that up for you now that I never had, and I will repeat it again, any conversations with any Richfield employees in any way, shape or manner, outside of the conversation with Mr. McGahan and the one the short time I met Mr. Duncan.

Mr. Krasne: So the record will be straight, do you mean prior to your making the deal with Mr. Davis, as you testified before?

A. Yes; prior to making my deal with Mr. Davis.

Q. By Mr. Paradise: And what was the date of your conversation with Mr. Davis that you just mentioned? A. I think it was on January 8th.

Q. Of 1941? A. Of 1941. [175]

Q. At the time you and Mr. Clements were inspecting the property, what estimate of tonnage did you fix for the pipe lines?

A. Well, as I told you, the pipe lines in the wells we estimated, that is, Clements estimated because I am not well enough versed to make an estimation of wells, at 50,000 to 100,000 feet and the rest of the material there, as I told you, we lumped, that is, I in my own mind and with the limited information that I had made my own estimation of the total of everything.

Q. I don't understand your answer, Mr. Ferer. There is no such thing as pipe line in the wells, is there?

A. Well, I don't know. I would call it pipe line. It is pipe down there and it is a line. That is what I would figure it, as pipe line in the well, but I am not an expert on wells. If you ask me any questions about wells, I won't be able to give you much information.

(Deposition of Morris Ferer.)

Q. Are you acquainted with oil field operations?

A. No, sir.

Q. You never have been?

A. I never was before I got into this and my knowledge to date is very limited.

Q. Are you familiar with the fact that in the oil industry the phrase pipe lines is used solely in connection with the surface lines connecting wells to tanks and connecting tanks and that any steel that is installed in a well [176] and cemented in the well is referred to solely as casing?

A. I can't agree with you on that because in my line of business pipe and casing would be the same thing and we are in the habit of calling everything pipe.

Q. That is, after it has been removed from a well, when it is on your racks in your warehouse?

A. I can't answer that other than I would know it as pipe. I have heard it referred to as casing but it all serves the same purpose and we call it pipe.

Q. Your knowledge is limited to your operations of buying and selling of so-called steel pipe, when it is not installed or cemented in a well, is that correct?

A. That is correct.

Q. You say that the estimate that you made of the tonnage of the casing in the wells was from 50,000 to 100,000 feet?

A. I didn't say that I made that estimate.

Q. Was that the estimate you used as the result of what Mr. Clements told you?

(Deposition of Morris Ferer.)

A. I used that in my figures, yes, to arrive at an idea of what we were going to offer for the total of all the material on there.

Q. Will you describe what examination you made of the wells?

A. We went around and looked at the wells and we saw these stubs sticking out, and I remarked to Mr. Clements [177] that that was pretty heavy pipe, a large pipe, and he explained to me that that was merely the outside and that inside of this pipe were other lines of pipe or casing, if you want to call it that. And everything was cleaned away from there. There was nothing there except these stubs sticking out. And, of course, stacked around the property were pieces of heavy timber, rotted and cut up and so forth, that he told me came off of what they called the derricks. And that is how we got into the conversation about how much material would be in those wells and that is how Clements said to me that there should be at least 50,000 to 100,000 feet of pipe out of the wells alone.

Q. Did he state whether that was the quantity that could be recovered or that that was the quantity that was cemented in the wells?

A. No; he stated that was the recoverable quantity.

Q. How many wells did that include, that estimate?

A. I didn't go into that detail. We didn't have an opportunity to count them all but he told me that that was what the wells would yield.

Q. How could you arrive at an estimate as to the aggregate quantity without knowing how many wells there were or approximately how many wells there were?

(Deposition of Morris Ferer.)

A. As I just said, I took Mr. Clements' figures on it. I could count them from now until the cows came home and I wouldn't know what the difference was. I can tell something [178] that I can see and I can formulate my own opinion but on items like that, that I know nothing about, I took it for granted that that was a fact.

Q. Do you know anything about the abandonment of oil wells, Mr. Ferer?

A. Only what I have learned since I have gotten into this job.

Q. You didn't know anything about it at that time?

A. No; except that Clements casually remarked that certain work had to be done in abandoning a well. But I didn't go into detail and I didn't give much thought to it. I was more interested in what would come out of the wells in the way of pipe for my money, that is, for the money that I was going to invest.

Q. Did Mr. Clements tell you the manner in which a well must be abandoned?

A. No. We didn't have time for that. We had plenty of work to do to look over all this property.

Q. Did Mr. Clements tell you that you can't remove casing that is installed in an oil well without abandoning it in accordance with the requirements of the State laws on the subject?

A. As I stated before, he stated that there were some State laws that had to be complied with and certain things that had to be done, but I didn't go into detail.

(Deposition of Morris Ferer.)

Q. Did he tell you at that time that those requirements [179] were equally applicable to the owner of the property as well as to any contractor who wanted to abandon wells?

A. I don't remember him telling me that.

Q. Did Mr. Clements tell you anything about the items of cost that entered into the abandonment of an oil well?

A. Well, not in detail. He told me the cost—I don't remember the exact wording but he told me that the cost of abandoning a well was considerably less than the amount of salvage we would get out of it or I would have gone into detail otherwise. But as long as he put it that way and again told me that he felt sure that we would get at least 50,000 to 100,000 feet of salvagable material, that is all I was interested in because there was not only cost of the wells but there were terrible costs in taking out other pipe lines that were underground, and there are considerable costs in handling the whole job away from your base of operations. So that the fact that there was a cost in abandoning these wells didn't mean anything to me at the time any more than the cost of removing the other material. It was just a question of the whole job being that way.

Q. Did Mr. Clements inform you that there were certain of the wells on the property from which no recoverable casing could be obtained?

A. Not in detail. In fact at that time I don't think we went into it.

Q. Did he discuss any individual well and state what [180] could be recovered from that particular well?



(Deposition of Morris Ferer.)

A. No, sir.

Q. Did Mr. Clements state that on certain of the wells the cost of abandonment would be more than the value of any casing that you could recover from the wells?

A. Not at that time. We merely arrived at the figures that I gave you before, that we would salvage 50,000 to 100,000 feet, and I took that for granted and into consideration the same as I did the rest of the material.

Q. Did Mr. Clements tell you that, before you could determine the cost of abandoning a well, it would be necessary to rig up and enter the well and put a bailer in the well in order to determine whether you could clean the same out?

A. He didn't go into detail as to what had to be done at that time.

Q. Mr. Clements testified in his deposition yesterday that it was his understanding and intention that in connection with the abandoning of a well the well would be entered and, if it turned out to be unprofitable to abandon a well, the well would be left as it was. Did he discuss that with you?

A. He did not.

Q. Was that your intention?

A. Well, we consider ourselves a pretty reliable company and, if there was any bitter with the sweet, we [181] would have to take it and, if there was anything we had to do, that is what we would have done because that is the way we do business.

Q. Did you make any estimate of the tonnage in the pipe lines?

(Deposition of Morris Ferer.)

A. As I told you, I lumped it all together, Mr. Paradise.

Q. If you estimated that the quantity of recoverable casing in the wells was from 50,000 to 100,000 feet, what was the total estimate that you placed on the tonnage of both the pipe lines and the casing in the wells?

A. Somewhere in the neighborhood of from 3,000 to 6,000 tons.

Q. 3,000 to 6,000 tons?

A. The total of everything.

Q. Now you are including the refinery equipment as well as the other producing equipment, are you?

A. I am including everything on the property.

Q. What were the other items of producing equipment?

A. I don't know what you mean. If you want me to enumerate the items that I think were on there, I will be glad to do it.

Q. What were the ones that you examined?

A. We examined surfacely everything that was on there, boilers, pumps, valves, pipe, sheets, warehouses and so forth.

Q. Aside from the refinery equipment, there were various items of producing equipment, were there not, in the nature [182] of boilers, tanks and pipe lines?

A. Yes; sure.

Q. Those were all examined?            A. Yes.

Q. Did you make any separate estimate of the ton-

(Deposition of Morris Ferer.)

nage of those producing facilities as distinguished from the tonnage of the refinery facilities? A. No, sir.

Q. The estimate you stated was between what limits?

A. 3,000 and 6,000 tons.

Q. Did you examine any loose equipment and metal that was lying around on the surface of the property, including both the refinery on the land and the producing end of the land?

A. When you say examined, there was a negligible amount of loose equipment. I don't know exactly what you mean by that. We didn't examine that any more than we did any of the rest of it. We laid no particular stress upon any particular thing up there. We just took it all the best we could.

Q. Did you see the scrap pile, that is to say, the pile of loose metal and wire lines and drilling bits and other equipment that was located on the property?

A. There were not many drilling bits, as long as you are enumerating them. In fact I don't remember seeing any drilling bits. There was a small amount of loose scrap iron [183] and there was a pile of rusty cable which at the time I made a mental note would be a headache. We didn't know, of course, when we examined it what disposition would be made of it, whether we would have to take it or have to move it or what we would do or whether we would even purchase the material because we hadn't entered into any agreement. But most of the material that was loose was cable and cable at that time was a liability. It was rusty and it was all twisted.

Q. Can you sell that by the ton as scrap iron?

(Deposition of Morris Ferer.)

A. You can sell it by the ton but the cost of handling it and preparing it for scrap metal is equivalent to the value that you can get out of it. The condition of this particular cable, which apparently had been laying there for an extremely long time, was it was very rusty and very twisted up. Cable to be sold as scrap must first be put through a fire to burn the rope core in the center, if there are any rope cores, and it must be cut to lengths of 12 inches. And this cable, or the great proportion of it, I would say the largest proportion of it, was so rusty that, if you tried to burn it or cut it, it crumbled. It was oxidized.

Q. That same rust condition prevailed over the tanks and boilers that you examined, did it not?

A. No, sir.

Q. Mr. Clements testified yesterday, Mr. Ferer, that in examining the wells, that is to say, the portion of the [184] wells which could be seen after the derricks were taken down, there was a stub of casing that appeared at the top, sticking out from the surface, which was capped, and that there was gas and oil escaping. Did you see the same thing?

A. Well, I saw some oil around some of the wells but I wasn't experienced enough to say whether it was seepage or not. And then, as we came on the property, I smelled gas and I said, "What in the devil is that?" And he says, "Well, that is gas escaping from wells", or something like that. But I didn't pay any attention to it. I wouldn't know enough about it and we had so much work to do that day that I didn't make any mental note or have any real remembrance about it outside of the fact that I did see some oil around some of the wells.

(Deposition of Morris Ferer.)

Q. What was your over-all estimate of the cost of performing the salvage work and cleaning up of the property?

A. Are you including the wells in that?

Q. Whatever estimate you made of your costs.

A. If I remember correctly, without the wells, we figured our cost for just removing the material would be approximately \$5 to \$7 a ton. As I said before, it was just hit and miss to even try to guess at the cost of removing that material because so much of it was concealed.

Q. When you say removing, does that mean transportation or what?

A. That means getting it prepared and ready to either [185] load on trucks or on cars. It doesn't include any transportation.

Q. It doesn't include the cost of dismantling the various buildings and cleaning up the surface of the property, which work is required to be done under the contract?

A. No, sir.

Q. What were your costs or what was your estimate of those costs?

A. I made no estimates. I just hoped that it would be low. We couldn't tell because we didn't know how it would jibe out. We didn't know exactly what had to be done. But, naturally, we made, or I made, mental allowances in my mind for cost of clean-up and so forth, but I had no set figure on it.

(Short recess.)

A. May I have the last question and answer read?

(Question and answer read by notary.)

(Deposition of Morris Ferer.)

Q. That figure that you mentioned, Mr. Ferer, of \$6 to \$7 per ton, did not include transportation, then?

A. No; it did not include transportation.

Q. And it did not include the cost of performing any work on the property in the nature of cleaning up, other than merely the removal of the equipment from where it was located and putting it on trucks, is that correct?

A. That is correct; and it did not include the cost of [186] the wells.

Q. Do you mean the cost of the abandonment of the wells?

A. The cost of the abandonment or the taking up of the pipe out of the wells.

Q. Did you estimate the cost of the abandonment of the wells at so much per well?

A. Well, I didn't. I wouldn't know what it was. Clements told me that—I don't remember whether Clements told it to me at that time or in the negotiations or when it was but—

Q. Let's limit your answer to any period prior to the time when you signed the contract and not to anything that occurred after that.

A. Clements told me that the wells would net us 50,000 to 100,000 feet. And, of course, in my figures, and when I said exclusive of the wells, I meant that the wells were such an item that I kept a mental separation of that: and I wanted to make sure that you understood that what I was talking about was the other materials because the wells would not go by the ton. I wouldn't figure that by the ton.

(Deposition of Morris Ferer.)

Q. What was your estimate of the cost of abandoning the wells or what figure were you using in your calculations?

A. I don't remember. I think that we figured at that time the footage that I have mentioned before and that the material would be worth—

Q. No. I am talking about costs now. [187]

A. I am trying to get at how I arrived at it, how the material would be worth, in other words, from \$50,000 to \$100,000, but I don't remember whether I figured that net or less the cost or how much. I don't really remember that.

Q. You don't recall whether the figure of \$50,000 to \$100,000 was profit or just gross proceeds, without deducting costs?

A. I don't remember that. As I tell you, I am very hazy on that. I was very much interested in the footage that he gave me at that time, which, of course, was what I was particularly interested in. He may have told me at that time that it cost possibly \$250 or \$300 or \$500 a well or he may have told me that later. I can't tell you that. I am hazy on that.

Q. Did you make any inquiry of him at that time, on that date that you and he examined the property, as to what the cost of abandoning those wells would be when he said that there would be a quantity of recoverable casing of between 50,000 and 100,000 feet?

A. I may have. It would seem logical that I would. We had several discussions and I don't know whether it

(Deposition of Morris Ferer.)

was at that time or a few days later or at a later date. It would be very hard for me to answer that question and state definitely.

Q. Were you leaving the matter of the estimates and valuations on the recovery on the casing from the wells and [188] the cost of abandoning the wells to Mr. Clements?

A. Yes, because it was the only thing I could do, knowing that I was so inexperienced on it.

Q. Were you also leaving to him the matter of the abandonment of the wells?

A. Well, we hadn't gotten that far but I intended to leave that all to him. I left the rest of it to him and the supervising of the job.

Q. Was there any mention on that date, and when I say that date I mean the date when you and Mr. Clements examined the property, of the exclusion of gas lines running to certain of the wells on the property?

A. No, sir.

Q. If we can summarize those figures, what was your estimate at that time of the entire gross proceeds that you expected to receive, that is, before division between you and Mr. Clements, the entire gross proceeds that you expected to receive on all of the equipment and facilities that you expected to take off?

A. That would be a hard question to answer, Mr. Paradise. As I have told you before, this thing was so approximate in every way, shape and form, that any real figure would be almost a pipe dream. I can tell you that I anticipated making a substantial profit for that kind of



(Deposition of Morris Ferer.)

a deal that would necessitate that amount of investment both in initial cost and taking it up and equipment and overhead items [189] involved.

Q. Did you make any estimate, within limits between a minimum and a maximum, of the gross proceeds you expected to get, entirely aside from the cost of doing your work?

A. I might have made an estimate, a mental estimate. I don't remember exactly what it was and I would just be kidding myself and I am not in the habit of kidding myself. I tried to be conservative about it and hoped that we would make a real profit commensurate with the project involved.

Q. Do you have any recollection whatsoever of the amount of gross proceeds that you expected to get?

A. No; I don't. It would be so vague and it turned over so many times in my mind and I had so many different figures that it would be strictly guesswork and it would be useless for me to set a figure because I would be setting a figure that I might have formulated since then. I can't give you an intelligent answer on that.

Q. Is there anything from which you could refresh your recollection as to the estimates that you made at that time?

A. Nothing except my mental attitude.

Q. Do you recall the estimate that you made, within perhaps minimum and maximum limits, of the total costs which would be incurred by you and by Mr. Clements in connection with doing the work?

A. No, for the same reason as to the profits; it was all too much guesswork. [190]

(Deposition of Morris Ferer.)

Q. Is it the same answer as to the anticipated amount of profits? Did you make any estimate whatsoever as to the amount of profit that you expected to make, that is to say, the excess of the gross recovery over and above your costs?      A. Yes; the same answer.

Q. You made no specific estimate?      A. No, sir.

Q. Did you make any estimate, specific or otherwise?

A. As I told you, I made many mental estimates but they kept changing because it was hard to try to get a figure as to how much was there and how much it would cost and how much there would be. The only estimates that I could make that were anywheres near definite were the question of the hauling or the question of a lump tonnage basis on removing the material.

Q. What was the main reason that you couldn't make a specific estimate? Was it, as you told me, that you couldn't tell the specific quantity or the weight and length of the pipe lines and the quantity of the casing in the wells?

A. That is correct because there was nothing definite about the quantity or length or weight that we would get out of it. We knew that we were going to get everything on there and anticipated everything on there.

Mr. Paradise: I move to strike the witness' answer in so far as his statement concerns what he knew. [191]

Mr. Krasne: Let the witness finish his answer if he hasn't.

Q. By Mr. Paradise: Did you finish your answer?

A. I don't remember. You interrupted me.

Q. I didn't mean to interrupt you. I am sorry.

(Deposition of Morris Ferer.)

A. That is all right. Will you read the answer?

(Answer read by notary.)

A. When I say we knew, I mean to say we figured on everything that was on there, on the property, and we expected to get everything on the property with the exception of the items that were to be excluded. I figured my price with that thought in mind and hoping that our profits would be greater than we figured on. We couldn't tell whether we would get so many thousand feet of pipe or so many hundred thousand feet of pipe. So I tried to be conservative and figured it that way.

Q. The quantity of the tonnage of the refinery equipment, that is to say, the stills and boilers and engines and so on, you could estimate within reasonably accurate limits, could you not?

A. Anything that was above the surface, we could get a rough idea. We could approximate it but it varies considerably and it proved it varied considerably. There was nothing accurate about it but what was on the surface we could get a rough idea of.

Q. What were the major items of refinery equipment you [192] were purchasing?

A. I can't get very technical with you but there were boxes of condensers with pipe in them.

Q. What was your estimate of the tonnage of any one of those condenser boxes?

A. I can't answer that. I haven't got that in mind.

Q. At that time could you make a reasonably accurate estimate of it by looking at it?

(Deposition of Morris Ferer.)

A. Yes; in my opinion I could make what I thought was a reasonably accurate estimate but that doesn't mean it would be so because there were boxes there with pipe in them and they had supports and they had steel or they were surrounded by steel, and it was all a guess.

Q. But, from your experience in handling that sort of equipment for a period of, I think you said, some 20 to 25 years, you could form a reasonable estimate of the tonnage involved in that piece of equipment just by looking at it, is that correct?

A. When you say my experience in handling that equipment, as I told you before, this is the first time I ever handled a refinery; but, when you speak of equipment, engines, pipe and so forth, I made an estimation at that time but I don't remember what it was because I lumped it all together.

Q. The same is true, I suppose, of the various tanks and boilers that were located on the producing end of the [193] field and referred to as producing facilities, is that correct?

A. Yes; the same is true of the tanks and the boilers. The boilers were easier to estimate because they are more a common item. The tanks were also a headache. That was another item where most of the tanks were galvanized and we didn't know whether they were rotten on the bottom or whether they were good tanks.

Q. You are talking now about condition rather than weight, are you? A. Yes.

Q. I was directing my question just to tonnage.

A. I couldn't personally estimate the tanks because I didn't have enough experience and, if I did have, I

(Deposition of Morris Ferer.)

wouldn't figure them as having much value because they were corrugated tanks. They might have been rotten or they might not have been.

Q. You say that the quantity which you could not estimate on a tonnage basis was the equipment that you couldn't see, that was under the surface, is that correct?

A. That is correct. And that, of course, we could guess at but we didn't know whether we were 50 per cent right or 200 per cent right or 10 per cent right.

Q. The total quantity that you were estimating was, I think you said, between 3500 tons and 6,000 tons?

A. No. I said between 3,000 and 6,000 tons. [194]

Q. What proportion of that estimate did you allow for the equipment and facilities that were under the ground?

A. I can't answer that again because I lumped it all together, as I told you.

Q. You were able to make an estimate of the tonnage of the equipment on the surface which you saw, that is to say, the tanks and the boilers and the loose steel, is that correct?

A. I don't know what you mean by loose steel.

Q. Mr. Clements mentioned yesterday that you and he expected to get some steel plates and supports for the stills and walkways and other items of that sort?

A. Well, that wasn't loose. That was part of the equipment. It was all intact.

Q. Was there any loose steel that you expected to get?

(Deposition of Morris Ferer.)

A. There was a negligible amount of rods, sucker rods, and pieces of angle iron but it didn't amount to anything. Everything was attached and in place and required labor to take it out.

Q. With that qualification that you made to my question, will you answer my question as to what estimate you made of the tonnage of the various items that you were able to examine specifically because they were on the surface of the property?

A. I can't answer as to the tonnage. I can only tell you to the best of my recollection. And the reason that [195] I am so vague about being able to give you tonnage is that the most or the biggest proportion of all of this material was hidden tonnage.

Q. The largest proportion?

A. Yes. The largest proportion was hidden tonnage. It was in the pipe and the pipe was in the wells and it was crisscrossed all around the property. And the tonnage of material that was above the ground was the smallest part of the deal and that is why I just had to guess and really gamble on the whole thing.

Q. When you say the largest proportion, can you give us more information about that? Can you state it in percentages?

A. I couldn't give it to you.

Q. It was well over 50 per cent? Is that what you mean to tell me?

A. Oh, yes.

Q. Did you make any calculation of the length of those pipe lines from the showing on the map of the location of the lines?

A. No.

Q. Did you attempt to trace on the map that Mr. Duncan gave you the length and location of those lines?

(Deposition of Morris Ferer.)

A. No. And I don't remember who told it to me—it might have been Clements or might have been Duncan—while the map showed lines, some of the lines had been taken out [196] or changed and so forth. So again we were up against that same guessing contest.

Q. In other words, you realized at that time that was not an accurate map of the property as it existed at the time you inspected it?

A. I didn't realize anything. I realized that the map would give us as much information as we possibly could get, that is all. In fact I again didn't pay much attention to the lines on the map because I wanted to go out and see what I could see for myself.

Q. You were not relying on the map, then, is that correct?

A. Well, I don't know what you mean by that, whether I was relying on the map or not. I didn't buy the material based on any tonnage that the map might call for.

Q. Mr. Clements testified yesterday that at the time you and he examined the property and were looking at the map there were various wells shown on the map that were not on the property. Do you recall that?

A. I recall his testifying to that.

Q. Do you recall his telling you that at the time you were on the property?

Mr. Krasne: May I ask was Mr. Clements' testimony that there were wells shown on the map that were not on the property or that, in addition to the wells shown on the map, there were actually other wells on the property? [197] Do you remember?

(Deposition of Morris Ferer.)

Mr. Paradise: I don't recall Mr. Clements' exact testimony on the point.

Q. But do you recall, Mr. Ferer, any conversations with Mr. Clements at that time to the effect that the map did not show the wells or the pipe lines as they existed on the property? A. No, sir.

Q. Following your inspection of the property on that occasion with Mr. Clements, did you make subsequent examinations of the property before the contract was signed on January 17, 1941?

A. I think we got a letter from Mr. Davis stating that they were accepting our offer, and we made another trip up to the refinery. There was Mr. Clements and my brother from the east and another relative of mine. We went up again on the property.

Q. Do you recall about when that occurred?

A. It was on a Sunday, somewhere between January 2, 1941 and the signing of the contract.

Q. Did you make any more specific examination of the property on that date than you did on the previous date?

A. No; just a prima facie examination like we did before. I showed my brother and my brother-in-law, I think it was, and another relative—I don't remember but I think it was a cousin of mine—what we had bought. And when I [198] say showed them what we had bought, I mean the property. I showed them the wells and I showed them the other materials and told them, as I have been telling you, that we were gambling on this.



(Deposition of Morris Ferer.)

Q. What were the names of the persons who made that trip?

A. Mr. Clements and Mr. Hyman Ferer—

Q. Is that your brother?

A. That is my brother. And Mr. M. D. Goodrich and I think Mr. Harry White and myself.

Q. Was there any Richfield employee or representative present at that time?

A. Do you mean in our party or who went around with us?

Q. Yes.           A. No.

Q. Did you talk to Mr. Duncan on that occasion?

A. I don't remember. I might have but I don't remember.

Q. You don't recall any conversations with Mr. Duncan then?           A. No.

Q. What was the next conversation following that date with any Richfield employee? Do I correctly understand that, other than that letter that you received from Mr. Davis between the date of your first examination and your second examination, you had no other conversations with any Richfield employees? [199]

A. That is correct.

Q. So that the only conversation that you had with any Richfield employee prior to the date of your second visit which you have just described was that conversation with Mr. McGahan?           A. That is correct.

Q. What was the next conversation that you had with any Richfield employees or representatives in connection with this transaction?

(Deposition of Morris Ferer.)

A. Only with Mr. Davis. I brought him up a cashier's check for \$22,000.

Q. Do you recall on what date that occurred?

A. I think it was January 8th.

Q. And that occurred in his office?

A. Yes, sir.

Q. And who were present?

A. I think Mr. Davis and Mr. Clements and myself. McGahan might have been there but I wouldn't say definitely.

Q. Did you have any extensive conversation with Mr. Davis at that time?

A. No; nothing extensive except that he told us we bought everything on there with the exceptions. And we talked about those exceptions and then I think he called you and you were tied up or you made a later date that we should come up and sign the contract or go over the contract.

Q. Do you mean that he called me on the telephone?  
[200]

A. Yes. And Mr. Davis handed us a memorandum of the sale, a second sheet of the sale, and that was about all. There wasn't any other discussion of any importance.

Q. Did you discuss at that time any of the items of equipment or facilities which you were to purchase?

A. No; we didn't discuss anything. The memorandum was practically self-explanatory.

(Deposition of Morris Ferer.)

Q. Did you have any discussions about any of the items in the memorandum? A. No.

Q. Did you inquire of Mr. Davis at that time as to the length or size of the pipe lines?

A. Not that I remember.

Q. Was there any mention of the pipe lines at that time by either you or Mr. Clements or Mr. Davis or Mr. McGahan? A. Not that I remember.

Q. Was there any mention by any of you of the oil wells or the casing in the oil wells?

A. No; there was nothing to mention. We bought everything and expected to get everything except the items that were excepted. I think that is about the main topic of conversation that there was outside of there might have been some conversation about some other plants that they had for sale or something like that. But there was no conversation because our offer covered everything and his memorandum covered everything and the items that were to be excepted, [201] we understood. We had already made the deal and we had given them our money and there wasn't anything to discuss that I remember.

Mr. Paradise: I move to strike the answer of the witness except in so far as it relates to the conversations on the ground that it is a conclusion and opinion of the witness and is unresponsive to the question.

Q. Was there any mention of the abandonment of any of the wells? A. No, sir.

Q. Had you already at that time submitted your offer of \$22,000? A. Yes, sir.

(Deposition of Morris Ferer.)

Q. You had prior to that?

A. Prior to the date that I saw Mr. Davis?

Q. Yes.            A. Yes.

Q. At the time that you were making up your offer of \$22,000, did you make a more specific estimate of the approximate tonnage in the pipe lines and the casing in the wells than you have testified to before?

A. No, sir.

Q. You were still guessing as to the quantity?

A. That is right.

Q. You made no inquiry of any representative or employee of Richfield Oil Corporation as to the quantity or [202] size or weight of the pipe lines or the casing in the wells?            A. That is correct.

Q. At that conversation with Mr. Davis was there any mention of the exclusion of the gas lines running to certain of the oil wells on the property?

A. Well I don't remember whether it was at that conversation or the conversation in this office but there was some water line mentioned and a gas line for the superintendent's house. When you say gas lines, I don't know what you mean by gas lines. But I recollect that in one of the conversations, either at Mr. Davis' office or up here in your office at the time of the drawing of the contract or at the time of your having the contract, the water line was mentioned because you were going to keep this superintendent's house there and a gas line for gas, one gas line. That is the only conversation there was that I remember about any gas lines at any time.

(Deposition of Morris Ferer.)

Q. Do you recall when that conversation took place? Was that in the conversation with Mr. Davis?

A. Either then or up here, I don't remember which. But they were only a few days apart. But it is very hard for me to pin this kind of a conversation down to whether it was one day or two days following. After all, I didn't anticipate any trouble on this kind of a deal.

Q. Do you recall exactly what was said with respect to the gas lines? [203]

A. No; there was nothing said other than just that they wanted to maintain a water line for the superintendent's house and for the cattle that they were going to have one there and a gas line so that the superintendent would have gas; that we couldn't disturb the gas line; that he had to have some kind of heating or something to that effect. That is the general trend of the conversation.

Q. Who was it that informed you of that?

A. I don't remember but somebody in the conference.

Q. It was either Mr. McGahan or Mr. Davis, was it?

A. Or it might have been you. I don't remember. As I told you, I don't remember whether that was in the conversation down there or whether it was up here at the time when we were discussing the things that were excepted. That was actually the whole gist of our conversation in all of these conferences, was things that we couldn't take.

Q. Do you know or do you recall whether there was a conversation as to the number of gas lines that were excluded?

(Deposition of Morris Ferer.)

A. I recall that the superintendent's house was the topic of conversation as to a gas line.

Q. In other words, that would be one end of the gas line?

A. I don't know whether it was one end or not. I know that my trend of thought at the time and the conversation was the fact that we had to keep water for the superintendent's house and had to keep gas there; that he had to have something to cook by because he lived there. [204]

Q. I merely meant that the gas lines that you were talking about discharged into the superintendent's house?

A. I guess so. I guess that is what they were talking about.

Q. Did you know to how many wells those excluded gas lines ran? A. No.

Q. Was there any discussion of that?

A. No. I didn't even know they came from wells. I didn't know that.

Q. Where did you think they came from?

A. Well, I didn't know. They might have had gas companies. I didn't know anything about that.

Q. There was no discussion whatsoever about that?

A. No; no discussion whatsoever.

Q. Of where the gas lines ran? A. No, sir.

Q. I call to your attention, Mr. Ferer, paragraph 1(h) of the contract, dated January 17, 1941, between Aaron Ferer & Sons and Richfield, and ask you to read it. Will you read it out loud, please?

(Deposition of Morris Ferer.)

A. Paragraph 1(h). "gas pipe lines connecting wells on the land above described to the superintendent's house (P. R.-1494)".

Q. You examined this contract? Or I believe you stated in your affidavit that there were two drafts of this [205] contract, is that correct?

A. I didn't state there were two drafts. I stated that there was one draft and it was changed. What type of draft it was I don't know. But I stated that I asked for a change in the contract and that change was made.

Q. You examined the first draft of the contract and then asked for changes, is that correct?

A. I asked for one change there in one paragraph and I presume that this final contract is the identical or the same contract that the other one was. I don't remember.

Q. That change that you requested was for the addition of the words "metal and lumber", was it not?

A. "All metal and lumber"; yes.

Q. That occurs in the same paragraph, does it not, of the contract?

A. I don't know. I will look and see. I don't know the contract by heart.

Q. This is the paragraph here.

A. Is this what you call a paragraph or is this all the same paragraph?

Mr. Krasne: Let the record show that the words referred to by counsel appear in the same paragraph but not the same sub-paragraph.

(Deposition of Morris Ferer.)

A. What do you want me to look at, Mr. Paradise?

Q. By Mr. Paradise: Mr. Krasne's statement is sufficient for my point. Upon reading that paragraph 1(h), which [206] states, "gas pipe lines connecting wells on the land above described with the superintendent's house", did it not occur to you from a reading of that paragraph, before you signed the contract, that the gas pipe lines that were being excluded from the sale ran from the superintendent's house to certain of the wells on the property?

A. No; it never occurred to me. As I told you, when you talked about having a gas line to the superintendent's house and you were going to keep that house and you wanted a water line there, I think it is reasonable to assume that you wouldn't want us to go in there and tear up that gas line and wreck the man's mode of living. So the thought never occurred to me. In fact, as I tell you, I didn't know that the gas came from the wells.

Q. There was discussion that the lines were to be left on the property for the purpose of supplying gas to the superintendent's house, was there not?

A. Yes; I think there was some discussion. That is one of the items that was excepted at the time with many of the other items. Your stress was particularly the water line because the superintendent had to have water and water for the cattle and the gas line, and that we shouldn't touch the gas line. But I don't remember it as gas lines. I remember it as gas line. But that is probably a technical point and I wouldn't give it a second thought.



(Deposition of Morris Ferer.)

Q. Did not this provision in the contract, which [207] excludes gas pipe lines connecting wells on the land above described with the superintendent's house, call to your attention the fact that the gas lines were connecting the wells on the property?

A. No. I didn't give it any thought at all. In fact I think that on your map you show in red there one line that goes to some point, that is, a gas line that you excluded. That is about all there was but where the gas came from never occurred to me.

Q. Did you examine that map at the time you signed the contract, Mr. Ferer?

A. I think I looked at it. I won't say that I examined it minutely. I had every confidence in Richfield and I didn't have a lawyer here to draw up this contract.

Mr. Paradise: I move to strike the witness' statement as to his confidence as being unresponsive to the question.

Q. I show you, Mr. Ferer, the map that is attached to the original copy of the contract dated January 17, 1941, that being attached as an exhibit thereto, and ask you to point out the gas line marked in red that goes from the superintendent's house to any well or wells on the property.

A. As I stated, I am not a good map reader and, if you will show me the superintendent's house, maybe I can find it.

Q. The superintendent's house appears to be on the westerly portion of the property and marked "Superintendent's frame dwelling house, 28 feet x 52 feet (P.

(Deposition of Morris Ferer.)

R.-1494)". [208] Now I call your attention to a line marked in red, stating "2-inch gas." Do you follow that line to any wells on the property?

A. Yes; I see that line and it goes to what is marked well No. 36. And also on there it states, "and any extensions of gas line necessary to furnish gas to Duncan's house."

Mr. Krasne: So that the record may be more complete, it might show that the line to which counsel has directed the witness' attention and leading up to the well bearing the number 36 on the map appears to be the only gas line leading up to any well that is in red and that the pipe lines leading to the other wells shown on the map are not in red.

Q. By Mr. Paradise: But there are various other lines shown in red on the map, are there not?

Mr. Krasne: Yes, sir; but not gas lines to any well, unless counsel can direct my attention to one.

Q. By Mr. Paradise: This well No. 36 is not outlined in red, is it?

Mr. Krasne: No; but the gas line leading up to the well is.

Mr. Paradise: My question was directed to Mr. Ferer.

Mr. Krasne: Maybe we can stipulate, Mr. Paradise, that well No. 36 itself is not circled in red and that in fact none of the wells shown on the map are circled in red. I offer that as a stipulation, if you are willing to accept it. [209]

Mr. Paradise: I will let the map speak for itself.

(Deposition of Morris Ferer.)

Q. Did it occur to you or did it not occur to you, Mr. Ferer, that, with the gas line shown in red leading from the superintendent's house on this map and going over to well No. 36, it would be necessary to keep that well in operation in order that that gas might be furnished?

A. No; because, as I told you before, I didn't know where the gas came from.

Q. The line shown in red, the gas line, has definite boundaries, has it not, one terminal being the superintendent's house and the other terminal being well No. 36?

A. Yes; according to the map, it has.

Q. So that the gas must have come from the well?

A. I wouldn't know that. I suppose so, according to that line. But I wouldn't know anything about it.

Q. When that discussion occurred, did you inquire whether that well was to be excluded from the transaction? A. I did not.

Q. Was there any mention of wells at that time?

A. No; there was no mention of any wells.

Q. Did you inquire whether it would be permissible to abandon well No. 36 at that time?

A. I didn't make any inquiry at all because, as I tell you, a thing like that would never enter my mind and I didn't know where the gas came from.

Q. There is a legend which you read from the map in [210] connection with well No. 36, in red, which states, "and any extensions of gas line necessary to furnish gas to Duncan's house." Did it occur to you from a reading of that legend that it would be necessary to exclude other gas lines to other wells?

(Deposition of Morris Ferer.)

A. No. If anything, that would make me think they were getting the gas from some gas company and an extension might be necessary. As I tell you, I never knew the gas came from the gas well.

Q. You saw gas seeping from the caps on the wells, however, when you examined the property with Mr. Clements, did you not?

A. I did not. I just said that I smelled gas.

Q. You didn't see any other gas companies in the neighborhood or any gas companies in the neighborhood from which it could have come, did you?

A. No; except I saw a lot of tanks and to an ordinary layman they might have been gas tanks. I don't know.

Q. In spite of what appears on this map that you examined at the time you signed this contract, Mr. Ferer, did you expect to abandon those particular wells that are shown on the map?

Mr. Krasne: I object to the question on the ground that it assumes facts not in evidence. I may be in error but I believe the witness testified in response to counsel's question with respect to the map that he saw it but made no [211] minute examination of it. I may be in error but I believe that was the witness' testimony.

Q. By Mr. Paradise: May I ask you, Mr. Ferer, if you did examine this map at the time you signed the contract or before the time you signed the contract?

A. Well, when you say examined, I glanced at it. I didn't make a thorough examination of it. I don't think the map came with the contract. I think the map

(Deposition of Morris Ferer.)

was delivered later but I am hazy on that. I think the contract was mailed in to us and we signed it and returned it to you from my office and I don't think the map was attached to the contract. I think either you delivered the map to us or a messenger came with it. I am still very hazy on that and I am not sure.

Q. You don't know whether the map was attached to the contract at the time it was signed?

A. I don't remember.

Mr. Krasne: I will say for the purpose of the record and to counsel that it would appear from the executed copy of the contract which Mr. Ferer has delivered to me that what happened was that Richfield or Mr. Paradise as its attorney did mail the copies of the contract to Mr. Ferer for signing and that shortly thereafter there was delivered to Aaron Ferer & Sons the exhibit or the map because the contract which I have shows a receipt for the map which would appear to have been subsequently executed. [212]

Mr. Paradise: I don't understand your statement, Mr. Krasne. You don't intend that as testimony in this deposition, do you?

Mr. Krasne: No. I am simply trying to get this thing straight between yourself and myself as counsel, if we can.

Q. By Mr. Paradise: Did you examine the map prior to the time when you signed the contract, whether it was attached to the contract at the time you signed it or not?

A. May I have that question again, please?

(Question read by notary.)

(Deposition of Morris Ferer.)

A. I didn't examine the map prior to the signing of the contract and I don't remember whether I looked at the map at the time of signing the contract or not because, as I tell you, I am not sure whether the map was attached to the contract. In any event, I didn't make a minute examination of the map.

Q. But at no time prior to the signing of the contract did you make any inquiry as to the abandonment of the wells, either well No. 36 or any other wells, as to your right to abandon them?

A. Do you mean of Richfield?

Q. Yes. A. No, sir.

Q. In your affidavit, Mr. Ferer, that is attached to the plaintiff's motion for a summary judgment, there is a statement concerning a request by you for the inclusion of [213] certain language. I call your attention to paragraph 4 of your affidavit and ask you to re-read the same. Have you finished it? A. Yes.

Q. That conversation that you mention in paragraph 4 of your affidavit occurred when, Mr. Ferer?

A. In your office at the time we were discussing the final contract.

Q. How many conversations were there in my office? Do you recall?

A. I can only remember one.

Q. At that conversation that you are speaking of was a draft of the contract presented to you?

A. I think so; that there was a draft of the contract presented to me and that is the time that I asked you to make a change in that paragraph and have you change it because—

(Deposition of Morris Ferer.)

Q. I think you have already answered the question. Do you recall any conversation in my office, that took place prior to that date, at which the terms of the contract were discussed with you and Mr. Clements and Mr. Davis, before any draft of the contract was prepared?

A. Well, as I tell you, I only remember of being up here once.

Q. At this conversation at which you requested a change in the draft that was presented to you, will you state what [214] occurred?

A. We were discussing mainly the items that were to be excepted.

Q. Who were present at the conversation?

A. I think Mr. Davis, Mr. Clements, yourself and possibly McGahan, although I am not sure on that point. I know definitely that Mr. Davis, yourself and Mr. Clements and myself were here.

Q. And Mr. McGahan may have been here but you don't recall?

A. That is right.

Q. Now, what were the conversations?

A. The conversations were about the items that were to be excepted and there was something in the contract or draft, or whatever it was, that you handed me, and I don't remember exactly what it was, that I didn't quite understand and I said, "Well, as long as we are getting everything and we have bought everything with the exception of the items that you are excluding—" if you will remember, I said, "I haven't any lawyer up here. If you will just put in there 'all metal and all wood', that will cover everything except the items that you are excepting and I see nothing wrong with the contract."

(Deposition of Morris Ferer.)

Q. Do you recall stating that you had no lawyer here?

A. I am pretty sure that I stated that but I won't state that definitely but I think that I stated that. I [215] might have been kidding you at the time but I think I stated it.

Q. Your affidavit states that at that meeting there was presented to you a draft which contained the following provision, which is quoted in your affidavit as follows: "Said equipment and facilities so to be sold include all pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors and tanks, now located on said land, all subject to the exceptions hereinafter provided." Do you have that draft which contains that language?

A. No. I didn't take anything with me from that but I think the reason I knew what it stated was that you added the item of "all metal and all lumber" and no other changes were made.

Q. Then, your affidavit does not purport to quote what the language of the draft was but merely your recollection of the language of the draft?

A. Merely my recollection of the language of the final draft.

Q. But in your affidavit, where you quote from the language of the draft, that is your recollection, or did you have a copy of the draft before you when you prepared this affidavit?

A. No; I didn't have a copy before me. It was my recollection and, as I stated, the wording of the contract.



(Deposition of Morris Ferer.)

Q. Do you recall that at the time that discussion took [216] place about the phrase "metal and lumber" there was a discussion of what items were to be included in the sale?

A. No. I recall more of the discussion or practically all the discussion was mostly on what items were not to be included and also the discussion was about putting up fences and filling in the ditches for all these cattle you were going to have there and also there was a discussion of certain lines that were to be cut off at the tanks that you were to retain, these farm tanks, as they call them.

Q. Do you recall that as a part of the discussion there was mentioned by you or by Mr. Clements the fact that you wanted to obtain the metal walkways in the refinery property and the supports for the various stills that were being purchased by the Casmite Company?

A. Well, there might have been some discussion about it. I don't recall any particular outstanding discussion on that score because we discussed that everything on that property was to go with those exceptions and with the exceptions that you mentioned. And that is the reason I said to you, "Well, keep out the items that you don't want to go, that you have sold or that you are retaining, and put in there 'all metal and all lumber' and that covers everything."

Q. Do you recall requesting information as to what supports for the various stills and other equipment that was being purchased by the Casmite Company would be left on the property and would be sold to you under this contract? [217]

A. There might have been some discussion about that. It narrows back down again to what you were going to

(Deposition of Morris Ferer.)

retain and I think you said, you or Mr. Davis, that the Casmite Company, if they are the people that you sold those stills to, or whatever they are,—that all they bought was the stills and that we had to remove the bricks after they took them out and there were some supports there and we discussed that they didn't go.

Q. Do you recall that either you or Mr. Clements requested the privilege of removing the supports and having the steel walkways and supports and overhead lines?

A. There might have been a discussion but it doesn't stand out in my mind.

Q. Do you recall that Mr. Davis was requested by either you or Mr. Clements to phone Mr. Burke of the Casmite Company at that time and to inquire at what point those stills would be cut off and what quantities of steel supports and overhead lines would remain for your purchase?

A. I remember that there was a question there; that Mr. Davis sold the stills to this company and that he either called or was going to call someone from that company and have them understand that the stills were to be disconnected at the point of the stills and that nothing else was to go.

Q. And did he also state at the conclusion of that conversation that you were to have those metal supports and steel walkways and overhead lines? [218]

A. I don't remember. I would take it for granted that they would go because they were not excepted and everything that was on the property was to go.

(Deposition of Morris Ferer.)

Q. Isn't it true that that was what you were inquiring about, as to whether you were to have the privilege of taking those things? A. No.

Q. Who brought up that subject about the supports and the steel walkways and the overhead lines?

A. I don't know. I don't remember whether there was any discussion brought up about that unless it was in the question of what was to go and what wasn't to go. You were enumerating the items you had sold and anything else that wasn't sold was to go to us.

Q. Isn't it true, Mr. Ferer, that you raised the point when you requested the addition of "metal and lumber" and that you read that list of pipe lines, valves, fittings, buildings, boilers, pumps, engines, motors and tanks, and stated that that list did not include the sale of supports for the tanks or the overhead lines or the walkways or other miscellaneous equipment around the refinery, that were to be sold to you?

A. No; I brought no question up about that.

Q. You recall asking for the inclusion of the words "metal and lumber"?

A. Oh, yes; I definitely asked for it because— [219]

Q. I believe you have answered the question. At the time you asked for it, was not the discussion between the persons who were present in the room concerned with those matters that I have just mentioned, that is to say, the steel supports and the overhead lines and the steel walkways and the other loose metal on the surface of the land?

(Deposition of Morris Ferer.)

A. No, sir; my request for all metal and all lumber was to take in everything that was on that property.

Q. I am asking for what you said rather than what you intended at that time.

A. I said to include all metal and lumber for that reason, to take in everything that was on that property except the items that you had sold or were retaining. That was definitely my reason. Of course, as a layman, I took it for granted that the words "all metal and all lumber" would cover everything.

Mr. Paradise: I move to strike that as the witness' conclusion, as to what he took for granted.

Q. Was there any discussion at that time of the quantity of the pipe lines or the size or weight of such pipe lines?

A. There was no discussion except we requested of you a line that was an 8-inch line that ran from one of the tanks on part of the property to one of the other companies; that it wasn't necessary to have an 8-inch line and that we would substitute a 3-inch line. And you said that later [220] you would look into it and, if you could do it, you would do it and I think you permitted us to do it later on.

Q. When you say "you", do you mean me personally or Mr. Davis or Mr. McGahan?

A. I suppose it was Mr. Davis that I was directing the conversation to, either I or Clements. I don't remember. Maybe both of us discussed it. I don't remember whether I did it or Mr. Clements did it but that was the only reference that was made to the size or weight or length or anything else in that discussion in regard to the pipe lines.

(Deposition of Morris Ferer.)

Q. At the time you were talking about metal, was there any discussion whatsoever of the casing in the wells or the wells themselves? A. There was not.

Q. At the time you were mentioning the use of the phrase "metal and lumber", were you also not talking about the loose scrap metal that was lying around on the surface on the land, including the pile of wire line and loose corrugated iron sheets?

A. I was talking about everything on the property. As far as the loose metal is concerned, there was such a small quantity that there was not enough to make an issue out of it. And, when I asked you to put the phrase "all metal and lumber" in there, I had reference to everything, including the pipe, the pipe line in the wells and the pipe line and all the lumber and everything that was on the [221] property, and that is what I purchased and had in mind purchasing.

Mr. Paradise: I move to strike that as not being responsive to the question. I am asking solely for your conversations rather than what you thought or intended.

Mr. Krasne: In other words, if that is what you told the people present at that meeting, please so state. Strike that out. In other words, if that is what you told the people at that meeting, please state so for the purpose of the record.

Mr. Paradise: I think the witness understands the question.

Mr. Krasne: I don't know whether he does or not.

Q. By Mr. Paradise: I am asking for what was said in connection with your request that the words "metal and lumber" be added.

(Deposition of Morris Ferer.)

A. I said, if you would add the words "all metal and all lumber", it would cover everything with the exception of the items that you were keeping out and that would be the whole thing, that that would cover the whole thing, and that is all that I felt was necessary or the important part of the contract as far as my end was concerned.

Mr. Paradise: I move that the last sentence as to what Mr. Ferer felt be stricken as not responsive to the question.

Q. Did any Richfield representative at that meeting, either Mr. Davis or Mr. McGahan or myself, mention the [222] casing in the wells or the abandonment of any of the wells?      A. No, sir.

Q. There was no mention of that at any time?

A. No, sir.

Q. Did you inquire at that time as to the quantity of any of the recoverable casing or does your former answer include that?      A. That is correct.

Q. That there was no mention of that subject?

A. I don't quite understand you.

Q. My question is this. As I understood your former testimony, you had no information as to the quantity of the casing in the wells or the quantity of the pipe lines because it was underground and you couldn't examine it and, therefore, you were just guessing as to the quantity that you expected to purchase?

A. That is correct.

Q. Did you inquire at that time in that conversation or in any other conversation as to the quantity that was there?

(Deposition of Morris Ferer.)

Mr. Krasne: Inquire from whom?

Q. By Mr. Paradise: That is, from any employee or representative of the Richfield Oil Corporation.

A. No, sir.

Q. You were interested in that quantity?

A. I was interested but, as I told you before, Mr. Clements told me what he thought was recoverable and that [223] was settled in my mind.

Q. That is, recoverable from the wells?

A. From the wells; yes, sir.

Q. Did Mr. Clements tell you what quantity there was in the pipe lines?

A. No; he didn't tell me that because he couldn't guess any more than anyone else because it was hidden. It was all buried underground, all that portion of it.

Q. I think you already testified early this morning that something in excess of 50 per cent of the quantity of equipment and facilities that you expected to salvage was represented by the pipe lines and the casing in the wells?

A. Yes; considerably over 50 per cent.

Q. But is it correct that you made no inquiry at all of any Richfield employee as to what that quantity was?

A. No. After that rebuff, or I wouldn't call it a rebuff, but after being told that there was no information available, I just decided to paddle my own canoe with Clements, who I felt was experienced and qualified enough to guide me along those lines.

(Deposition of Morris Ferer.)

Q. That was approximately a month prior to the conversation in my office, was it not, your conversation with Mr. McGahan, at which you said he did not give you that information?

A. I would say approximately a month; yes, sir.

Q. But, as I recall your testimony, you didn't inquire [224] of Mr. McGahan as to what quantity there was in the pipe lines or the length of the pipe lines?

A. No, sir.

Q. And you made no other inquiry of Richfield about it?      A. No, sir.

Q. Or of any Richfield representative?

A. No, sir. If you will let me add, there is another reason.

Q. This will have to be off the record or I will have to object to it.

Mr. Krasne: Do you want to explain your last answer?      A. Well, let it go.

Q. By Mr. Paradise: Was the map considered at the time of that conversation?      A. What map?

Q. The map that is attached to the contract.

Mr. Krasne: What conversation?

Q. By Mr. Paradise: We are talking about a conversation in my office with Mr. McGahan.

A. I don't think so.

Q. You don't recall that any map was shown to you?

A. I don't recall it; no, sir.



(Deposition of Morris Ferer.)

Q. Were there any other conversations subsequent to that meeting in my office that you have just mentioned?

A. Only the one with Davis in his office.

Q. The one with Davis in his office was prior to that [225] meeting, was it not? A. Yes, sir.

Q. Were there any subsequent meetings?

A. No, sir.

Q. Or conversations with any Richfield employees?

A. No, sir.

Q. When did you commence work under the contract?

A. A week or ten days after the contract was signed.

Q. How long did you keep your crew on the property?

A. They were on there up until about a month ago.

Q. At what time did you first take steps to abandon any of the wells on the property?

A. I don't remember the exact day. It was some time in June or something like that; June or the latter part of May.

Q. Of 1941? A. Yes.

Q. That would be some four to six months after the contract was signed, is that correct?

A. Yes, sir; although I am a little hazy on that because I didn't handle that. Clements handled that. But I think that is when the question came up that you were objecting to the oil wells being taken up or something.

Q. At any time prior to that date, either May or June of 1941, did you take any steps to abandon any of those wells? [226]

(Deposition of Morris Ferer.)

A. We discussed it all the time. And then it was raining. There was a terrible rainy period there and no action could be taken. We ran into difficulties all the time on account of rain.

Q. You didn't answer my question. I just asked you whether you did anything about it during that time.

Mr. Krasne: You can answer it yes or no and then go on and explain your answer, if you care to make an explanation.

A. Will you repeat the question, please?

Q. By Mr. Paradise: At any time prior to the date that you fixed, somewhere in May or June of 1941, did you take any steps to abandon any of the wells?

A. No; we didn't and the reason was that it rained. They had a terrible rainy season up there and that ground gets just like gumbo. You can't even walk in it and we were helpless.

Q. Did you make any mention to any Richfield employee or representative at any time before that date in May or June of 1941 of the fact that you either intended to abandon those wells or that you thought you had the right to abandon any of the wells?

A. No; we didn't because we took it for granted that, like everything else we were taking, we would take the wells.

Mr. Paradise: I move to strike the portion of the answer as to what the witness took for granted as not being responsive to the question. [227]

Q. When was the first occasion on which you discussed with any Richfield representative the matter of the abandonment of those wells?

(Deposition of Morris Ferer.)

A. We never discussed it outside of the time that I talked to Mr. Davis or Mr. Kelly or somebody about it after we were told that Richfield were not going to permit us to take the wells.

Q. When was that?

A. I don't remember. I would have to refresh my memory from a letter that you wrote us or something.

Q. It was not prior to the date in May or June that you mentioned, was it?

A. It was not prior to that; no, sir.

Q. At any time prior to the signing of the contract on January 17, 1941, did you make any inquiry of the Division of Oil and Gas of the State of California for its requirements in connection with the abandonment of those well? A. I did not.

Q. Did you direct any of your employees or agents to make such an inquiry? A. I did not.

Q. Did you make any other investigation or inquiry as to the manner in which the wells would be abandoned?

A. When are you asking about?

Q. At any time prior to the date of signing the contract. A. No, sir. [228]

Q. Did it occur to you, Mr. Ferer, either at the time of the signing of the contract or at any time prior to that time, that the Richfield Oil Corporation as the owner of that land would have some interest in the manner in which those wells would be required to be abandoned?

A. Yes; it occurred to me because they stated in their contract with us that we would have to abide by all the State laws and fish and game laws and so forth.

(Deposition of Morris Ferer.)

Q. There is express mention of fish and game laws, is there not?      A. Yes.

Q. Is there any mention of the Division of Oil and Gas? Or I think the contract speaks for itself on that. You say it did occur you, then, upon reading the contract that Richfield would have an interest in the manner in which the wells were to be abandoned?

A. Well, no; it didn't occur to me that they would have in the manner that they would be abandoned other than what our contract covered. They stipulated in their contract that everything had to be done in the proper manner and cleaned up properly and everything else.

Q. What provision of the contract are you referring to?

A. I am referring to the clean-up and to the provision of the contract that states that we should clean everything up and that we should comply with all of the laws and so forth. Now what the paragraph is I don't know. [229]

Q. Isn't it true that the provisions of the contract relating to cleaning up relate to the surface of the property?

Mr. Krasne: I think that is asking the witness for a conclusion. I think the contract speaks for itself on that score.

Mr. Paradise: Perhaps the witness' answer to the last question had best be stricken, then, on the same ground, and I so move, or perhaps the answers to the two preceding questions where he discussed the provisions of the contract. I so move.

(Deposition of Morris Ferer.)

Q. But at the time that occurred to you, Mr. Ferer, did you make any inquiry as to the manner of the abandonment which Richfield should require?

A. No. As I told you, I left that all to Clements.

Mr. Paradise: That is all.

Cross-Examination.

Q. By Mr. Krasne: Mr. Ferer, you referred to a conversation with Mr. McGahan that took place shortly before you went up to the property with Mr. Clements. I will ask you whether or not in that conversation Mr. McGahan told you what, if anything, the Richfield Oil Corporation was interested in selling on the property?

Mr. Paradise: I object to that question on the ground it assumes a fact not in evidence. I believe the witness [230] has testified he didn't recall whether that conversation took place before or after his visit to the property. Is that correct?

Mr. Krasne: I will reframe the question.

Q. You submitted an offer in writing relating to your proposed purchase of the equipment at Casmalia to the Richfield Oil Corporation, did you not? A. I did.

Q. What did you intend to buy by your offer?

A. We intended to buy everything on that property, including all the equipment, wells and everything, except the items that they had sold or were retaining, such as the tanks, the farm tanks, and the items they told us were sold.

Q. Prior to the time that you made an offer to Richfield Oil Corporation in writing, had Mr. McGahan or any other official or employee of Richfield Oil Corporation

(Deposition of Morris Ferer.)

told you that Richfield was interested in selling only producing and refining equipment and facilities which were on top of the surface of the land?      A. They did not.

Q. Prior to the time that a written contract was finally executed between Richfield and yourself on January 17, 1941, had Mr. McGahan or any other official or employee of Richfield Oil Corporation told you that Richfield desired or intended to sell only such equipment as was on the surface of the land? [231]

A. They did not.

Q. When you made a proposal in writing for the purchase of the equipment on the property, did you intend to offer to buy only such equipment as was upon the surface of the land?      A. I did not.

Q. When making your offer in writing, was it your belief and intention to offer to buy all producing and refining equipment on the property, whether it be above or below the surface of the land?      A. Definitely.

Q. And at the time you executed the contract in writing on January 17, 1941, was that your belief and intention?      A. It certainly was.

Q. At both the time that you made your offer in writing and at the time the contract was signed on January 17, 1941, was it your belief and intention that there was to be included in the subject matter of the sale the pipe that was in the oil wells on the property?

A. It was.

Q. Had Mr. McGahan or any other official or employee of Richfield Oil Corporation told you prior to the execution of the written contract on January 17, 1941

(Deposition of Morris Ferer.)

that Richfield did not intend that the subject matter of the sale was to include the pipe in the oil wells on the land? A. They did not. [232]

Q. Did anyone connected with Richfield ever tell you that casing in the oil wells was not to be included in the sale? A. They did not.

Mr. Krasne: I will ask Mr. Paradise if he has in his files the original letter addressed to Richfield Oil Corporation, signed by Aaron Ferer & Sons, dated December 10, 1940, which contains the written offer to buy in this matter.

Mr. Paradise: Do you have a copy of it there?

Mr. Krasne: Yes; I do.

Mr. Paradise: I don't believe I have the original of that letter in my files, Mr. Krasne. As you know, the offices are closed today and I imagine that the original of this letter, if the original was received by Richfield, is in the purchasing department's files, that is, Mr. Kelly's and Mr. Davis' department.

Q. By Mr. Krasne: Mr. Ferer, I show you what purports to be a carbon copy of a letter, dated December 10, 1940, addressed to Richfield Oil Corporation, and indicating that the letter was sent by Aaron Ferer & Sons. Do you recognize that document? A. I do.

Q. Is it a true and correct carbon copy of a letter written by Aaron Ferer & Sons to Richfield Oil Corporation on the date indicated? [233] A. It is.

Q. I read to you the first paragraph of the letter, which is as follows—

(Deposition of Morris Ferer.)

Mr. Paradise: Before you do so, I presume it may be stipulated that, when that file is available and the original is compared with that, any corrections may be made that are necessary.

Mr. Krasne: It is so stipulated.

Q. "We are pleased to submit our bid in the sum of Twenty-two Thousand Dollars (\$22,000.00). to cover all tanks, pipe, valves, fittings, buildings, boilers, and all other materials now situated on your Casmalia refining and producing property, plus pipe line running from the aforesaid property to and including loading rack adjacent to the railroad track, one-half mile west, including boiler and other incidental materials. We exclude the following items:

"Superintendent's house, garage and building now used as a cow barn,

"Main incoming water line, and such line as needed to supply house and cow barn,

"Six large steel storage tanks, approximately 50,000 barrels each,

"Six shell stills, plus one shell still bottom previously sold to the O. C. Fields Company.

"Certain 4 Inch Tubes previously sold to the West Coast Oil Company." I direct your attention to the word "pipe" [234] in the portion of the letter which I have read into the record and ask you whether or not at the time you wrote this letter you intended the word "pipe" to include the pipe in the oil wells on the property as well as all other pipe on the premises.            A. I did.



(Deposition of Morris Ferer.)

Q. What was the next thing that happened in this transaction after you sent that letter, that is, the letter dated December 10, 1940, to Richfield Oil Corporation?

A. What was that question again?

Q. What was the next thing that happened in this transaction after you had sent your letter of offer?

A. What was the next thing that happened?

Q. Yes; in this transaction.

A. I think we received a call from Mr. Davis and a letter stating that they accepted our offer.

Mr. Krasne: Mr. Reporter, I will ask you to be good enough to mark the carbon copy of the letter, a portion of which I have read into the record, as Plaintiff's Exhibit No. 2 for identification.

Q. When you had this telephone conversation with Mr. Davis, in which he told you that Richfield Oil Corporation was accepting your offer, was there anything else said? A. Not that I remember.

Q. And thereafter did you receive a letter from Richfield Oil Corporation confirming their acceptance of [235] your offer? A. I did.

Q. I show you what purports to be a letter from Richfield Oil Corporation, addressed to Aaron Ferer & Sons, bearing date January 2, 1941, and ask you if that is the letter to which you refer. A. That is.

Mr. Krasne: The letter just shown to the witness is in the following form and language (reading same). I will ask *ask* you, please, Mr. Reporter, to mark this document I have just read as Plaintiff's Exhibit No. 3 for identification.

(Deposition of Morris Ferer.)

Mr. Paradise: Are you offering those documents, Plaintiff's Exhibits 1, 2 and 3, in evidence. Mr. Krasne, as a part of this deposition?

Mr. Krasne: Yes; I will off them in evidence as Plaintiff's Exhibits 1, 2 and 3, respectively.

[Plaintiff's Exhibits 1, 2 and 3 appearing in the record at this point are heretofore printed at pages 215 to 221 and are therefore omitted here.]

Q. Mr. Ferer, when you received this letter from Richfield Oil Corporation, dated January 2, 1941, did you read it?      A. I did.

Q. And you saw the word "pipe" in the first paragraph of it, did you?      A. Yes, sir.

Q. Did you understand the word "pipe" to cover pipe in the oil wells as well as all other pipe on the property?

Mr. Paradise: I suggest that is leading and suggestive [236] and I prefer to have the witness' testimony as to this understanding.

Q. By Mr. Krasne: Please answer the question, Mr. Ferer.      A. What was the question?

(Question read by notary.)

A. I did.

Q. At the time you received this letter, did you have any knowledge of any intention on the part of Richfield Oil Corporation that Richfield Oil Corporation did not intend that the pipe in the oil wells was to be included in the sale which they were accepting by this letter?

A. I did not.

(Deposition of Morris Ferer.)

Q. Did you suspect that Richfield Oil Corporation did not intend by this document to accept a deal wherein the pipe in the oil wells was not to be sold to you?

A. I did not suspect that they did not intend by this document to accept a deal wherein the pipe in the oil wells was to be sold to me.

Q. At any time prior to the execution of the contract dated January 17, 1941, did you have any knowledge of any such intentions on the part of Richfield Oil Corporation?

A. I did not.

Q. At any time prior to the execution of the contract dated January 17, 1941, did you suspect that Richfield Oil Corporation had any such intentions?

A. I did not.

Q. At any time prior to the execution of the contract dated January 17, 1941, did you have any knowledge or [237] suspicion that Richfield Oil Corporation intended to sell to you only such producing and refinery equipment and facilities as were located upon the surface of the land?

A. I did not.

Q. After receiving the letter from Richfield dated January 2, 1941, did you deliver to Richfield Oil Corporation a cashier's check for \$22,000?

A. I did.

Q. When did you do so?

A. On January 8th or thereabouts.

Q. And did you personally deliver the check?

A. I did.

Q. Where did you deliver it?

A. To Mr. Davis' office.

(Deposition of Morris Ferer.)

Q. On that occasion did you have a conversation with Mr. Davis?      A. Yes.

Q. Who was present?

A. Mr. Clements and Mr. Davis and myself and I am not sure whether Mr. McGahan was there or not.

Q. Will you please relate the conversation?

A. It was a conversation that we bought the property and Mr. Davis, I think, called Mr. Paradise and he told us that Mr. Paradise was busy and that in a few days we would draw up a contract and that they were excepting some items, and that is about the generalities of the conversation. [238]

Q. I show you what has already been marked as Plaintiff's Exhibit No. 1, purporting to be a memorandum of sale of material and equipment at Casmalia, and appearing to have the initials "HED" in the lower left-hand corner. When did you see that paper for the first time?

A. Mr. Davis gave it to me the day I brought up the check.

Q. Did he prepare it in your presence, do you remember?      A. I don't remember.

Q. Was that before or after Mr. Davis called Mr. Paradise and found he wasn't available?

A. I don't remember.

Q. Did he say anything to you when he handed you this paper?

A. He said this was the terms of our sale and that we would draw up a contract on that basis.

(Deposition of Morris Ferer.)

Mr. Krasne: The instrument which I have shown to the witness, being Plaintiff's Exhibit No. 1, is as follows. The heading is, "Sale of Material and Equipment at Casmalia. To Aaron Ferer and Sons—"

The Notary: I can copy the rest of it in if you wish, as it will be attached to the deposition. It has been offered in evidence and it will have to be attached to the deposition.

Mr. Krasne: Do you have any objection to our substituting copies for these exhibits so that I may have [239] the originals in my file?

Mr. Paradise: No; I have no objection to the substitutions. Do you mean after the depositions have been written up and the exhibits attached, your making copies and substituting them?

Mr. Krasne: Yes.

Mr. Paradise: That is satisfactory. Since this is to be attached to the deposition, there is no need of reading it into the record at this point.

Q. By Mr. Krasne: I direct your attention, Mr. Ferer, to the following language contained in Plaintiff's Exhibit No. 1, "Everything will be sold to the above with the exception of the following", and after that there are six items listed. Did you read this memorandum at the time it was handed to you by Mr. Davis? A. I did.

Q. And did you see in it the provision which I have just read to you? A. I did.

Q. And what did you understand at that time to have been intended by Richfield Oil Corporation when it used the words, "Everything will be sold to the above with the exception of the following"?

(Deposition of Morris Ferer.)

Mr. Paradise: Do you mean what was the witness' understanding of the meaning or what was his understanding of Richfield's intention? [240]

Mr. Krasne: What was his understanding of Richfield's intention.

Mr. Paradise: I think that calls for the conclusion of the witness unless the witness is being asked for specific conversations by Richfield employees, and I will object to the question on that ground.

Mr. Krasne: Ordinarily an objection such as counsel has made might be well taken but, since the defendant has put into issue in this case the question of what the plaintiff suspected the defendant's intentions to be, it becomes material for this witness to testify as to any such suspicions or as to his belief as to the defendant's intentions. Will you go back and read the last question to the witness?

(Question read by notary.)

A. Just what it says, everything, and just what I figured on, all the pipe in the wells and everything on the property excepting the items that they retained or had sold elsewhere.

Q. The defendant in this action, Mr. Ferer, in its counterclaim or cross complaint has alleged, in substance and effect, that there was an oral agreement between yourself and Richfield Oil Corporation, wherein it was agreed by yourself and Richfield that the pipe or casing in the oil wells was not to be included in the sale from Richfield to yourself. Did you ever enter into any such oral [241] agreement with Richfield?

(Deposition of Morris Ferer.)

A. No, sir; there never was any such agreement.

Q. Did you ever have any conversations with any official, employee or representative of Richfield Oil Corporation, wherein anything to that effect was stated by either of you?

A. Prior to the contract?

Q. Yes.

A. No, or for that matter at any other time. No such agreement or conversation was ever had.

Q. It has, likewise, alleged in its counterclaim or cross complaint that there was an oral agreement between yourself and Richfield, wherein it was agreed by the parties that only the producing and refinery equipment and facilities upon the surface of the land were to be embraced in the sale from Richfield to yourself. Was there ever any such oral agreement?

A. There was not.

Q. Was there ever any conversation between yourself and any of the officials, employees or representatives, of the Richfield Oil Corporation in which anything to that effect was said?

A. There was not.

Q. So that the record will be clear, I believe Mr. Paradise asked you whether or not at the meeting in his office which you referred to there was any discussion about [242] supports and other items of equipment having to do with certain stills. And I understand your testimony with respect to that subject matter to be that any such conversation about any such pieces of equipment was for the sole purpose of clarifying the particular items that Richfield had excluded from the conveyance to you?

(Deposition of Morris Ferer.)

A. That is correct.

Q. In other words, at that meeting was there any discussion as to the particular items of equipment or facilities that were being sold to you by Richfield?

A. No; no particular items. It was everything in general. Everything was to go but the items that they had sold or the tanks that they were retaining.

Mr. Krasne: That is all.

Redirect Examination.

Q. By Mr. Paradise: Mr. Ferer, in answer to Mr. Krasne's question, you stated that your conversation with Mr. McGahan occurred before you made a written offer to Richfield Oil Corporation, which I believe you identified as your letter of December 10th, which is Plaintiff's Exhibit No. 2. How long before that letter was written did you have this conversation with Mr. McGahan?

A. I can't tell you that. I don't know. I can't fix the time but it was before that because I tried to gather all of the information I could. [243]

Q. And by referring to this letter, does that refresh your recollection as to whether that conversation with Mr. McGahan occurred before or after your first visit to the Casmalia property with Mr. Clements?      A. No.

Q. How did you happen to call Mr. McGahan about this transaction?

A. Well, Mr. Clements spoke to me and I knew Mr. McGahan handled the salvage end of Richfield, and I don't remember whether, as I told you, it was a phone conversation or whether it was at his office. In either event, at the time I saw no harm in either talking to him or calling him to find out what I could about it.



(Deposition of Morris Ferer.)

Q. Did any request or suggestion come from Richfield that you call Mr. McGahan or that you get any information from Mr. McGahan? A. No, sir.

Q. Did Mr. Clements suggest that you call Mr. McGahan? A. No, sir.

Q. Did you know at that time Mr. McGahan's status and authority and capacity with Richfield Oil Corporation?

A. I only knew that he handled some of the salvage and that sometimes he took bids and sometimes sent them up here. I didn't know how much authority he had or anything else except that he was the man to contact on salvage.

Q. I believe you stated in answer to Mr. Krasne's [244] question that Mr. McGahan said that he wanted a bid on everything, using the word "everything"?

A. I stated that I was under the impression that everything was to go with the exception of the items that were sold. It is very hard for me at this late date to try to fix identically what was said. I can only go by what my thoughts were at the time or what brought me to those thoughts.

Q. Did Mr. McGahan state at that time that he had no authority to make any contract or conclude any arrangement and that the same would have to be made with officials of Richfield Oil Corporation?

A. That wasn't even discussed.

Q. Your offer was in the amount of \$22,000, is that correct? A. Yes, sir.

(Deposition of Morris Ferer.)

Q. What portion of that amount did you allocate to the casing in the various wells as distinguished from the other items of facilities and equipment which you were purchasing?

A. As I told you, I lumped that all together. I didn't make any distinction. I lumped everything together.

Q. Then, you can't pick out any portion of that \$22,000 which in your estimate and calculations at that time represented the casing in the oil wells?

A. No. I figured it all as one deal and that everything goes and we might be luckier on one end than another [245] or one thing would offset another, and I lumped the whole thing together.

Q. In your conversation with Mr. Davis, that I think you said occurred on January 8th, did Mr. Davis tell you that it would be necessary to make a written contract on this transaction?

A. That seemed to be his procedure. He didn't say it was necessary. He just merely took it for granted that you were going to write up a contract.

Q. Did Mr. Davis tell you not to commence doing any work on the property until after the written contract had been prepared and executed by both parties?

A. I don't remember. I don't think so. I don't think that was discussed.

Q. You didn't start doing any work on the property until after January 17, 1941, did you?      A. No, sir.

Q. Were there any changes in the transaction that were made subsequent to January 8th and the date when the contract was signed?

(Deposition of Morris Ferer.)

A. The only changes that were made were the changes that were discussed where you changed that "all metal and lumber." That is all I know about.

Q. I hand you Plaintiff's Exhibit 1, which I understood you to say was given to you by Mr. Davis on January 8th, is that correct? [246] A. Yes, sir.

Q. Did that memorandum purport to set forth all of the terms of your contract with Richfield Oil Corporation?

A. No. That merely was the nucleus or the basis that the contract would be drawn on.

Q. It was merely a preliminary memorandum for the purpose of discussion, was it not? A. I imagine so.

Q. When the contract was finally prepared and signed, were there additional exclusions from the exclusions stated on that memorandum?

A. Yes; there were some additional exclusions made that came up in the discussion.

Q. One of the additional matters that was excluded was the gas lines running from the wells to the superintendent's house, is that correct? A. Yes, sir.

Q. That had not been discussed at the time this memorandum was prepared, had it?

A. No, sir; I don't think so. It might have been discussed that day or discussed up here in the office. I don't know.

Q. Do you mean discussed subsequently?

A. No; at that time.

(Deposition of Morris Ferer.)

Q. You say it might either have been discussed at that time in Mr. Davis' office or subsequent to that? Did I [247] correctly understand you?

A. No; I think it was discussed up here in the office at the time we made the change in the contract.

Q. That was after the date on which this memorandum was prepared?      A. Yes, sir.

Q. At your meeting in my office, which occurred subsequent to January 8th, when this memorandum was prepared, were other terms of the contract discussed, other provisions that are not included in this memorandum?

A. Yes; small details. Little differences or different things were discussed but nothing of major importance. That memorandum covered the basis of our deal.

Q. There was nothing stated in the memorandum, was there, about such matters as compliance with certain laws and the regulations of the fire warden and the Fish and Game Commission and the matter of the term of the contract and the matter of how Aaron Ferer & Sons work was to be performed and the matter of insurance coverage and indemnification or mechanic's liens or unemployment insurance, taxes or other property taxes, including sales taxes, or the rental of the property?

A. That is correct.

Q. Those matters were all discussed and agreed upon subsequent to the date of this memorandum, is that correct?

A. They were not discussed but they were put in your [248] contract. You drew it up. They were in the contract you drew up.

(Deposition of Morris Ferer.)

Q. You don't recall any conversations on any of those points?

A. Well, you might have asked me if we had insurance and I told you yes or something like that. I mean it was taken for granted it would be in the contract.

Q. Had they been discussed either on January 8th, at the time of this memorandum Plaintiff's Exhibit 1 had been prepared, or at any time before then?

A. No; except that this was merely a basis, as I said, or the nucleus for the outstanding terms of the contract, that is all.

Q. What does the phrase "pipe line" mean to you?

Mr. Krasne: I object to that on the ground it has been asked and answered.

Q. By Mr. Paradise: Will you answer the question?

A. Pipe line to me means all pipe that is on the property and pipe in the wells.

Q. You are talking now about the phrase "pipe line", are you? A. Well, pipe line and pipe.

Q. You say pipe line means something other than pipe line?

A. Pipe line to me would mean a string of pipe, whether it was vertical or horizontal or any other way. [249]

Q. Is that the meaning you are putting upon it now or is that the impression that you have always had of the meaning of the phrase "pipe line"?

A. I am putting it on there now and I have always had that.

Q. You have lengths of pipes at your warehouse, do you not? A. Yes, sir.

(Deposition of Morris Ferer.)

Q. Do you refer to those as pipe lines?

A. No; they are not in a line. They are stacks of pipe.

Q. A pipe line means a length of pipe that runs in the ground and has been installed in the ground, does it not?

A. Not necessarily. I would say a pipe line would mean a line of pipe in any direction, vertical or horizontal or any other way. It is a line of pipe.

Q. Calling your attention to Plaintiff's Exhibits 2 and 3, dated December 10, 1940 and January 2, 1941, respectively, Mr. Krasne called your attention to the use of the word "pipe" in those exhibits. Do you recall that?

A. Yes, sir.

Q. Do you find in the contract that was signed, dated January 17, 1941, any reference whatsoever to pipe other than the reference to the phrase "pipe line", and I call your attention particularly to the provisions of paragraph 1, which state what equipment and facilities are to be sold [250] under the contract?

Mr. Krasne: That is assuming facts not in evidence. The contract says everything is being sold. Counsel is referring to something that is a gratuitous generalization.

A. Shall I answer that question?

Q. By Mr. Paradise: I call your attention to the phrase in the contract, the sentence reading as follows: "Said equipment and facilities so to be sold include generally all pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors, tanks, metal and lumber, now located on said land, all subject to the exceptions herein-after provided." Is there any reference to pipe there as distinguished from pipe lines?

(Deposition of Morris Ferer.)

A. There is no reference there to pipe but pipe and pipe lines to me are the same thing. There is a reference there to pipe lines.

Mr. Krasne: Do I understand counsel's point to be that none of the pipe on the property was included in this conveyance, none of the pipe?

Mr. Paradise: I am directing my questions to the casing that is installed in the wells, Mr. Krasne.

A. I notice in this contract Exhibit A that you use the word "pipe" here, beginning at "property known as Point M", and so forth.

Q. Are you referring to the property description which sets forth a monument from which metes and bounds directions [251] are computed?

A. I suppose so. I don't know. I just noticed the word "pipe" there, is all.

Q. That would not be a pipe line, would it?

A. No; I don't think so.

Q. Mr. Ferer, in examining this contract dated January 17, 1941, did it occur to you that there was a difference in the language of the equipment and facilities to be sold under this contract, where the word "pipe line" is used, which differs from the word "pipe" in your letter of January 2, 1941?

A. It did not because, as I stated before, we figured we were buying everything.

Q. The list of items specified in your letter of January 2nd, which is Plaintiff's Exhibit No. 3, states, "tanks, pipe, valves, fittings, buildings, boilers, tank car loading facilities", and then it goes on. That language is practi-

(Deposition of Morris Ferer.)

cally identical, is it not, with the language in this contract with the exception that there has been added to the language of this contract the words "metal and lumber" and also that the word "pipe" has been changed to "pipe lines"? Will you compare the two?

A. Yes; that is correct.

Q. When you saw that change, did you make any inquiry or raise any question as to what was intended by the change?

A. Not on that particular change but that is one of [252] the reasons I had you change it to read "all metal and lumber".

Q. Did you mention the change between "pipe" and "pipe lines" when you were asking for the insertion of the words "metal and lumber"? A. I did not.

Q. So, if you had a question in your mind at that time as to the reason for the change from the word "pipe" to the phrase "pipe lines", you never inquired about it?

A. I didn't have any particular question in mind because I had only in mind that we bought everything on that property with the exception of the items that you were retaining.

Q. I don't think you are answering my question.

A. Well, I answered it. I said that I didn't have any change in mind.

Q. You saw that the change had been made, however?

A. No; I can't say that I even noticed any change. I didn't have my papers up here and I didn't make any comparison.



(Deposition of Morris Ferer.)

Q. You read that provision of the contract so carefully that you wanted the addition of the phrase "metal and lumber", did you not?

A. I read that particular phrase, not having in mind the question of pipe or pipe line. I had in mind that we bought everything on that property. [253]

Q. When you asked for the inclusion of the words "metal and lumber", was it not true that you were discussing at that time the supports and overhead lines and the other loose metal that was located not only on the refining end of the property but also on the producing end of the property?

A. I answered that question by stating that I had that in mind, to cover everything on the property.

Mr. Paradise: That is all.

Recross-Examination.

Q. By Mr. Krasne: When you signed the contract on January 17, 1941, did you observe the following clause, "Seller covenants and agrees to sell to buyer, subject to the exceptions hereinafter provided, all of the equipment and facilities now located on said land" and so forth?

A. I did.

Q. What was your understanding of the meaning of that clause?

A. Just what it says; that everything, including the pipe in the wells, all the equipment and all the facilities and all the pipe and all the pipe lines and everything else, went on there with the exception of the items that they excepted.

Mr. Krasne: That is all. [254]

(Deposition of Morris Ferer.)

Redirect Examination.

Q. By Mr. Paradise: When you considered that sentence from the contract to which Mr. Krasne just directed your attention, what interpretation did you give to the phrase "now located on said land"?

A. It would be the interpretation that everything on there, on the property, pertaining to metal and lumber and all the facilities, belonged to me.

Q. Does the phrase "all of the equipment and facilities now located on said land" mean the same to you as the phrase, if it had been used, "all the equipment and facilities now located on and under the land"?

A. I wouldn't know how to answer that question. I have told you my interpretation and I sincerely thought and still believe that I was buying everything on that property, the wells and everything else, because there was so much of the material that was hidden.

Q. Inasmuch as more than half of the material was under the land as you have testified, the material that you had in mind, did it occur to you that the phrase "on said land" might not include that?

A. I am sorry but I haven't got a legal mind. It didn't occur to me.

Q. Did you inquire about it at that time?

A. No, sir.

Mr. Paradise: That is all.

MORRIS FERER. [255]

Subscribed and sworn to before me this 12th day of February, 1942.

ROSS REYNOLDS,

Notary Public in and for the County of Los Angeles, State of California.

(Seal) [256]

STATE OF CALIFORNIA,  
COUNTY OF LOS ANGELES—ss.

I, Ross Reynolds, a Notary Public in and for Los Angeles County, State of California, do hereby certify that the witnesses in the foregoing depositions named were by me first duly sworn to testify the truth, the whole truth and nothing but the truth in said cause; that said depositions were taken, commencing at the hour of 10 o'clock a. m. on Friday, February 6, 1942, in Room 1221 Richfield Building, 555 South Flower Street, Los Angeles, California, in the City of Los Angeles, County of Los Angeles, State of California, and on Saturday, February 7, 1942, commencing at the hour of 10:30 o'clock a. m., at the same place, and were completed on said last mentioned date; that said depositions were taken down in shorthand writing by me and were thereafter, under my supervision, transcribed into typewriting, and that they are a true record of the testimony of the said witnesses; that the said depositions were submitted to the said deponents for reading, and, after reading the same, they directed that I make the following changes and gave the following reasons therefor:

Page 38, line 9, change "steel" to "still". The witness Clements stated that the word "steel" is an error in transcription.

Page 52, line 25, after the word "Yes", add "as far as this map shows but there are other wells on the south [257] part of the property." The witness Clements stated that he made the change to avoid misconstruction; that

he thought counsel was talking about what the map he was pointing to showed but the answer might have indicated that there actually were no other wells there.

Page 112, line 16, after the word "Casmalia", add "before the contract was signed." The witness Clements stated that he thought counsel mean that.

Page 132, line, 2, strike out the words "there was" and insert "that", and strike out the word "to" and insert the word "could". The witness Clements stated that he believed the reporter misunderstood his answer.

Page 219, line 13, strike out the word "lines" and insert the word "items". The witness Ferer stated that he meant "items".

Page 237, line 16, after the word "not", add "suspect that they did not intend by this document to accept a deal wherein the pipe in the oil wells was to be sold to me." The witness Ferer stated that he thought that was what the question meant.

Page 243, line 21, strike out "2nd" and insert "10th". The witness Ferer stated that he believed "2nd" was an error by the reporter.

I further certify that thereupon, after the said corrections above mentioned were made by me, the said depositions were subscribed in my presence. [258]

I further certify that during the taking of said depositions counsel for the plaintiff had marked for identification and offered in evidence three documents, which have been identified by me as Plaintiff's Exhibit No. 1, Plaintiff's Exhibit No. 2 and Plaintiff's Exhibit No. 3,

respectively; that, pursuant to stipulation between counsel for the respective parties, copies of said exhibits are hereto annexed and the originals have been returned to counsel for the plaintiff.

I further certify that I am not of counsel or attorney for either of the parties in said depositions and caption named, or in any way interested in the event of the cause named in the said caption; and that I am not related to either of the parties thereto.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal of office this 13th day of February, 1942. (Seal)

ROSS REYNOLDS

Notary Public in and for the County of Los Angeles,  
State of California. [259]

[Endorsed]: Filed Feb. 14, 1942.

[Endorsed]: No. 10743. United States Circuit Court of Appeals for the Ninth Circuit. Aaron Ferer & Sons, a co-partnership, Appellant, vs. Richfield Oil Corporation, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed April 17, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeal for the  
Ninth Circuit

No. 10743

AARON FERER & SONS, a co-partnership,  
Appellant,  
vs.

RICHFIELD OIL CORPORATION, a corporation,  
Appellee.

STATEMENT OF POINTS ON APPEAL AND  
ASSIGNMENT OF ERRORS.

Plaintiff and appellant sets forth his statements of points on appeal and his assignment of errors as follows:

I.

The court erred in ordering the dismissal of the first cause of action for declaratory relief set forth in plaintiff's amended complaint.

II.

The court erred in denying plaintiff's motion for summary judgment, because the defendant's affidavits and depositions taken in resistance thereof failed to show or tend to show any oral agreement as alleged in defendant's counter claim or cross complaint.

III.

That the court erred in granting the defendant's motion for summary judgment, because defendant failed and refused to file the affidavit of any person stating that plaintiff and defendant had ever entered into an oral agreement different than the written agreement between the parties.

IV.

The court erred in having considered or given any

weight to said depositions in deciding plaintiff's motion for summary judgment.

V.

That each and every finding of fact except findings of fact Nos. 1, 2, 6 and the last sentence of 7, are unsupported by the evidence and the evidence is insufficient to sustain any of said findings.

VI.

The following findings of fact, among others, as made by the court are each and every one contrary to the evidence in said case and there is no substantial evidence to support any of said specified findings or any part thereof: Finding Nos. 3, 4, 5, 7, except that portion reading as follows: "Said R. D. Montgomery was never in direct communication with plaintiff, or any representative of plaintiff at the time said contract was executed, or during any of the antecedent negotiations; and Findings Nos. 24, 25, 26, 27, 28, 29 and 31.

VII.

The court erred in making its finding No. 30, because it had previously found and concluded in a written opinion and decision dated December 29, 1941, defendant had sold the pipe in the oil wells in controversy, under the written contract, dated January 17, 1941, and that said contract was clear and unambiguous.

VIII.

That the findings are contrary to the evidence and are unsupported by the evidence.

IX.

That the findings are insufficient to support the conclusions of law or the judgment because nowhere in said findings is it found that the parties ever entered into an

oral agreement, containing the provisions set forth in Paragraph 2 and Paragraph 6 of the court's conclusions of law and in Paragraph II of the court's judgment.

# X.

That the conclusions of law do not sustain the judgment because nowhere in said conclusions of law does the court as a matter of law conclude that plaintiff and defendant entered into an oral agreement containing the provisions set forth in Paragraph II of the Judgment.

# XI.

That the findings are insufficient to support conclusions of law or the Judgment.

# XII.

That the court erred to the substantial prejudice of plaintiff's rights in refusing to permit plaintiff to be relieved of the stipulation previously entered into by the terms of which stipulation depositions were taken and affidavits filed by defendant in connection with defendant's resistance of plaintiff's motion for summary judgment were to be considered at the trial as evidence.

CARL B. STURZENACKER and  
PHILIP N. KRASNE

By CARL B. STURZENACKER

CARL B. STURZENACKER—

Attorneys for Plaintiff.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Apr. 21, 1944. Paul P. O'Brien,  
Clerk.



No. 10743

IN THE

**United States Circuit Court of Appeals**  
**FOR THE NINTH CIRCUIT**

---

AARON FERER & SONS, a co-partnership,

*Appellant,*

*vs.*

RICHFIELD OIL CORPORATION, a corporation,

*Appellee.*

---

**APPELLANT'S OPENING BRIEF.**

---

CARL B. STURZENACKER,

PHILIP N. KRASNE,

505 Taft Building, Los Angeles 28,

*Attorneys for Appellant.*

**FILED**

SEP 25 1944

**PAUL P. O'BRIEN,**  
CLERK



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No. 10743

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

AARON FERER & SONS, a co-partnership,

*Appellant,*

*vs.*

RICHFIELD OIL CORPORATION, a corporation,

*Appellee.*

---

## APPELLANTS' OPENING BRIEF.

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A.

Jurisdiction is sustained in this case by Title 28, Section 225, and Title 28, Section 400. (Jud. Code, Sec. 274d) U. S. Codes.

B.

### Questions Raised by This Appeal.

1. Where a complaint for Declaratory Relief shows that an actual controversy exists between the parties concerning their rights and duties under a written contract; that the property involved consists of casings in oil wells valued at \$50,000.00; that the parties desire to act on their rights; that present rights are involved and defendant is withholding plaintiff's property, and that the parties are not friendly, is it error for the trial court to dismiss the complaint on the ground that the contract is clear and un-

ambiguous and that by its terms said property has been sold to the plaintiff;

2. Is it error for the trial court, after construing said contract as above stated, and where it is shown that defendant's answer and counter pleading is sham and frivolous, to deny plaintiff's motion for summary judgment?

3. Where, in said action, defendant by counter-pleadings seeks reformation of the written contract on the ground of mutual mistake or mistake of one party which is known or suspected by the other and the evidence fails to show any prior agreement different from the written contract, should the judgment for the defendant be reversed if the court does not find that any prior and different agreement was entered into?

4. In the case stated in No. 3, if the ground was mistake by the defendant, which plaintiff knew or suspected, is it essential that defendant plead and prove and that the court find that the mistake did not result from defendant's negligence?

5. Where findings that the one party to a written contract did not intend to purchase property conveyed thereby and that the other party did not intend to sell the same, based entirely upon other findings of facts which do not logically or rationally tend to show such lack of intent on the part of said parties, and where no prior oral agreement is found, can said findings sustain a conclusion of law or a judgment that the written contract should be reformed to conform to an intent of the parties which the court finds the parties had when the written contract was executed?

C.

Statutes involved. Title 28, Section 400, U. S. C. (Jud. Code, Sec. 274d), entitled "Declaratory Judgment Authorized; Procedure," Sections (1) and (2):

(1) In cases of actual controversy the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

Rule 56, Rules of Civil Procedure, entitled "Summary Judgment," subdivision (a), for Claimant.

"A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

Subdivision (c):

"Motion and Proceedings thereon. The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the

day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

Subdivision (e):

“Form of Affidavits; Further Testimony, Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.”

Section 3399 of the Civil Code of California, entitled, When Contract May Be Revised, provides:

“When, through fraud or mutual mistake of the parties, or mistake of one party, which the other at the time knew or suspected, a written contract does not fully express the intention of the parties, it may be revised, upon the allegation of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value. (Enacted 1872.)”

Section 1856 of the Civil Code of Procedure, entitled *An Agreement Reduced to Writing Deemed the Whole*, provides:

When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

2. Where the validity of the agreement is the fact in dispute.

But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties.

Section 1865 of the Code of Civil Procedure, entitled *"A Written Instrument Construed As Understood By Parties"*, provides:

A written notice, as well as every other writing, is to be construed according to the ordinary acceptance of its terms.

Section 1656 of the Civil Code of California, entitled *Necessary Incidents Implied*, provides: All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded.

## Explanatory Statement of Facts.

This appeal is taken from a judgment in favor of the defendant based on its "counterclaim and cross-complaint."

The action was begun by Ferer & Sons, a co-partnership, whose business was dealing in junk and second-hand machinery and equipment.

The amended complaint consisted of two counts. By the first count the plaintiff sought declaratory relief pertaining to a controversy with respect to the duties and rights of Ferer & Sons and Richfield Oil Corporation under a written contract to which they were the parties as buyer and seller respectively.

The subject matter of the contract was the "production equipment and facilities" of an oil field in Santa Barbara County which property was owned by Richfield. The dispute arose over the casings in the oil wells, the question at issue being whether by the terms of said contract, the casings were included or excluded from the property sold and conveyed.

In the District Court the suit was owned by the defendants through the skillful legal maneuvering of its able counsel who came from behind after having decisively lost the opening round of the battle.

From a professional standpoint the story of this accomplishment is interesting and educational. As a practical business matter it is drab, unattractive and costly to the appellant.

In the second count of the amended complaint damages were alleged for breach of the contract and the prayer asked judgment thereon in case the court should deny the prayer for declaratory relief and specific performance



under count one. At the outset the defendant boldly moved that both counts be dismissed on the ground that the contract expressly excluded the oil well casings from the sale, thus compelling an immediate interpretation of the contract.

In due time the trial judge, Honorable Harry A. Hollzer, denied the motion to dismiss the amended complaint but "sustained" the motion to dismiss the first count and directed the defendant to answer the second count. [R. p. 41.]

This order was accompanied by a "memorandum of conclusions" in which the court carefully and ably analyzed the terms of the contract and concluded that "under the terms of said contract the defendant sold and conveyed to plaintiff the casing in the oil wells on defendant's land described in said contract," and, also, that "the court further concludes that upon the face of the pleadings it appears that defendant has wrongfully breached said contract," this conclusion, however, being reached without prejudice to the right of the defendant to answer the amended complaint and establish such defense as it may have thereto." [R. p. 38.]

It is obvious that the reservation of court's decision for further developments depending on the defendant's answer applied only to conclusion that defendant had breached the contract as alleged in count two of the amended complaint and did not apply to the interpretation of the contract which was sought by count one, which conclusion or finding was not thereafter revised or altered.

Since the court had construed the contract favorably to the defendant and the defendant's only claim in refusing to permit plaintiff to remove the casing, up to that

time,<sup>1</sup> had been that the contract itself excluded the casing from the sale. The way was apparently clear for a motion by the plaintiff for summary judgment.

However, the answer was duly filed. It consisted of a maverick document the latter portion of which included among other things, a "counterclaim or cross-complaint" in which an oral agreement was alleged to have been entered into antedating the written contract by which the casings were excluded from the sale. The defendant prayed that the written contract be reformed to conform to said alleged oral agreement.

It was this juncture, that plaintiff moved for summary judgment against the defendant. The motion was based primarily on the grounds that defendants pleading and defense was "written merit and frivolous." This motion was supported by the affidavit of Morris Ferer in which it was averred, that he, alone, had conducted the negotiations for plaintiff relative to said sale, culminating in said written contract, and that no oral agreement had ever been entered into prior thereto, different from said written instrument or excluding said casings from said sale. The defendant filed opposition affidavits<sup>2</sup> none of which contained any denial of the Ferer averment concerning the absence of any prior oral agreement as set forth in the counterclaim, and none of said opposition affidavits repeated said averments of defendant's pleading.

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<sup>1</sup>See affidavit of Morris Ferer in support of plaintiff's motion for summary judgment which was never denied. [R. p. 59.] Plaintiff awaited defendant's answer and then promptly moved for summary judgment. [R. p. 56.]

<sup>2</sup>Affidavits of its employees, Davis [R. p. ....]; McGahan [R. pp. 83, 97], and Kelly [R. p. 196].

The court permitted the defendant to take the depositions of Morris Ferer, Zeidenfeld and Clements.<sup>3</sup> Zeidenfeld's deposition showed that he knew nothing about the negotiations involved and Clements swore that he had no part in them and Ferer absolutely denied the alleged oral agreement. Nevertheless, after long deliberation Judge Hollzer denied plaintiff's motion for summary judgment [R. p. 112.]

Thereafter a trial was had in which the court opened wide the door and permitted the defendant to assail the integrity of the written contract without let or hindrance, regardless of the fact that no prior oral agreement was ever attempted to be proved. The court's findings contain no reference to such prior agreement, and it expressly refused to make any finding which would conflict with the decision in denying the motion to dismiss.

The procedure thus followed in the trial was regarded as proper by the trial judge principally by reason of an averment in defendant's counter pleading to the effect that the defendant executed the written contract through its own mistake and that the plaintiff knew or suspected said mistake on the part of the defendant. Appellant expects to show that the circumstances which convinced the trial judge that Morris Ferer suspected that the Richfield Corporation did not intend to sell the oil well casings when it executed the contract which so provided could not justify even a rational suspicion that Ferer so suspected. We expect to also prove that if the testimony of Richfield's employees is true that they knew that

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<sup>3</sup>Zeidenfeld was an employee of plaintiff. Clements was a dealer in second-hand equipment and owned a one-third interest in the written contract. [R. p. 154.]

their employer intended to retain the casings, their conduct in admittedly failing to so inform Ferer upon occasions when silence amounted to concealment, and in executing written instruments which expressly represented that the casings were being sold, constitutes criminal fraud.

When these things and other assignments of error are sustained are shown appellant anticipates that this court will conclude that such of Judge Hollzer's findings as number 29, which declares that defendant's vital mistake "was not caused by or the result of negligence on the part of the defendant," are contrary to the evidence.

Appellant assigns the following grounds for reversal of the judgment rendered herein:

I.

The Trial Court erred in denying plaintiff's motion for summary judgment.

II.

The Court erred in dismissing the First Cause of Action in plaintiff's complaint.

III.

All of the essential findings of fact are contrary to the evidence. They are unsupported by any substantial evidence.

IV.

The findings are insufficient to support the conclusion of law or the judgment.

V.

The conclusions of law do not sustain the judgment.

## APPLICABLE FUNDAMENTAL PRINCIPLES OF LAW.

Pertaining to the rules governing the reformation of contracts upon the ground of mistake, the legal premises will be laid in the beginning so that with them recalled to mind the factual situations and evidentiary items to be presented may be more readily evaluated and classified with the use of minimum of space and words.

### I.

#### The First Essential to the Right to Reform a Written Contract Is Proof of a Prior Oral Contract.

In a Federal case, *Fidelity and Guaranty Fire Corp. v. Bilquist*, 108 Fed. (2d) 715, the court said:

*"The prime factor in all cases justifying reformation of a written contract is an oral or implied agreement which the written contract was intended to express."*

From another Federal decision, *Columbian Nat'l L. Ins. Co. v. Black*, 35 F. C. D. 571 (71 A. D. A. 128), we quote:

*"(5) 2 Lack of antecedent agreement. It is quite true that before a writing may be reformed, to express the real agreement of the parties, the parties must have agreed. Rescission may sometimes be had because there is no agreement, but reformation necessarily implies an agreement. Travelers Ins. Co. v. Henderson, 69 F. (2d) 762 (8 C. C. A.); Southern Surety Co. v. U. S. Cast Iron Pipe & F. Co., 13 F. (2d) 833 (8 C. C. A.)."*

The case last cited in the above quotation, *Southern Surety Co. v. United States, etc. Co.*, 13 F. (2d) 833, not only upholds the text of the *Columbian, etc. v. Black* case but upon facts very similar to those of the instant

case, holds that no prior agreement was proved, although the trial court had held to the contrary.

The Supreme Court of California, in the case of *Harding v. Robinson*, 175 Cal. 534, at page 542, said:

“He must show, in addition to the mutuality of mistake, *that the minds of the contracting parties met, that they agreed upon a certain thing* which was to have been embodied in their contract, and that by mistake it was either fraudulently or inadvertently omitted or clumsily and ambiguously expressed.” (Italics ours.)

To the same effect, also, see: 22 *Cal. Jur.*, p. 734; 43 *R. C. L.*, p. 310; 53 *Cal. Jur.*, p. 934; *Pomeroy's Eq. Jur.*, Secs. 859, 1376(L). This proposition is so universally established and so fundamental that extended quotations from decisions are unnecessary.

It is not enough to prove the prior agreement and changes, in the executed contract.

It is essential to *plead and prove how the alleged mistake was made.*

*National Bk. v. Ex. Nat'l Bk.*, 186 Cal. 172;  
*Auerbach v. Healy*, 174 Cal. 60.

The *Auerbach* case involved an alleged mistake in the description of property. The complaint alleged that “the draftsman omitted to insert in said description the block in which said lot of land is located.” The court said,

“Nevertheless, both parties may have fully understood it and may have intended it to be as it is,”

and, it was declared:

“It is necessary to aver facts showing how the mistake was made, whose mistake it was, and what brought it about, so that mutuality may appear,” (Citing 34 *Cyc.* 973, and 14 *Ency. Pl. & Pr.* 42.)

II.

The Degree of Proof Required.

The evidence must be of "the clearest and most satisfactory character."

*American Chemical v. Tremaine Land Co.*, 17 F. (2d) 549;

*Sun v. Vinton Pet. Co.*, 248 Fed. 623.

California decisions to the same effect, are:

*Burt v. Los Angeles Olive Growers' Ass'n*, 175 Cal. 669;

*Hockstein v. Berghauscr*, 123 Cal. 861.

To the same effect are:

*Holsen v. Butler*, 63 Cal. App. at p. 72;

*Burt v. L. A. Olive Growerss Ass'n*, 175 Cal. 60;

*Ford v. Yarba*, 123 Cal. 447, 449.

It is apparent that both Federal and State courts are in full accord with the law elsewhere, and that as said in the *Southern Surety Company* decision opinion the prior agreement must be proved by the "clearest and most satisfactory character."

"The evidence must be such as to leave no reasonable doubt upon the mind of the court," that the mistake was mutual and contrary to a prior completed agreement.

*Menefee L. Co. v. Gamble*, 242 Pac. 628, 631.

III.

Presumptions and Burden of Proof.

1. It is presumed that the written instrument expresses the true intention of the parties.

*Moore v. Vandermast*, 19 Cal. (2d) 94, 119 Pac. (2d) 129;

*Security First Nat. etc. Bk. v. Loftus*, 129 Cal. App. 650, 19 Pac. (2d) 295;

*Welk v. Conner*, 102 Cal. App. 286, 282 Pac. 953.

2. Every presumption to be invoked is in favor of the correctness of the written instrument and against the alleged prior agreement.

*Burt v. Los Angeles Olive Growers' Assn.*, 175 Cal. 668, 166 Pac. 993;

*Menning v. Sourissean*, 128 Cal. App. 635, 18 Pac. (2d) 77;

*Hockstein v. Berghauser*, 123 Cal. 681, 56 Pac. 547.

3. The burden of proof is on the party who seeks reformations to show that the instrument does not express the intent of the parties.

*Moore v. Vandermast, Inc.*, 19 Cal. (2d) 94;

*California Tr. Co. v. Cohn*, 9 Cal. App. (2d) 33, 40;

*Burt v. L. A. Olive Growers' Ass'n*, 175 Cal. App. 668, 675;

*Hockstein v. Berghauser*, 123 Cal. App. 681 684;



*Fraters Glass, etc. Co. v. S. W. Cons. Co.*, 107 Cal. App. 1;

*Bell v. McColgan*, 45 Cal. App.

In *Menning v. Sourissean*, *supra*, it is said:

“Every presumption in equity favors the view that a written instrument deliberately executed expresses the true intention of the parties and the burden of showing that an instrument does not express the true intent or meaning of the parties is upon him who seeks to avoid its plain terms and who seeks the reformation of a contract on the ground of mutual mistake must show the mistake by clear and convincing proof.”

The other decisions cited above, without an exception, are in full accord with this doctrine and these rules.

4. Having announced the above rules, especially “1” and “3” above, our Supreme Court in *Moore v. Vandermast*, added:

“This is particularly true where, as here, the instrument was drafted by an attorney representing the party seeking to alter the terms of the written instrument.”

The situation is the same in the instant case, except that in *Moore v. Vandermast, Inc.*, both parties were “aided by counsel”, whereas in this case Mr. Paradise drafted the contract and Aaron Ferer & Sons, accepted it, unaided by counsel.

Section 1855 of the Civil Code of Procedure, entitled, "Contents of Writing, How Proves," provides:

"There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

1. When the original has been lost or destroyed, in which case proof of the loss or destruction must be first made.

2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.

3. When the original is a record or other document in the custody of a public officer.

4. When the original has been recorded, and a certified copy of the record is made evidence by this code or other statute.

5. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole."

Section 1656 of the Civil Code of California, entitled "Necessary Incidents Implied," provides: All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded.

## ARGUMENT.

### I.

#### **The Trial Court Erred in Denying Plaintiff's Motion for Summary Judgment.**

Plaintiff's motion is authorized by to Federal Rules of Civil Procedure, Rule 56. The first paragraph of the rule authorizes the motion on the part of the plaintiff. It reads:

"(a) For claimant, a party seeking to recover upon a claim, counter-claim, or cross-claim or to obtain a declaratory judgment, may at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or part thereof."

Plaintiff's motion for a summary judgment reads:

"Plaintiff Aaron Ferer & Sons moves the Court as follows:

### I.

For a Summary Judgment in favor of plaintiff and against defendant as to all matters contained in plaintiff's complaint and defendant's counter-claim or cross-complaint, except the amount of damages to which plaintiff is entitled, for the following reasons:

The court has heretofore concluded:

(1) That under the terms of the written contract between the parties hereto, defendant sold and conveyed to plaintiff the casing in the oil wells on defendant's land described in said contract, and

(2) That upon the fact of the pleadings it appears that defendant has wrongfully breached said contract. (This conclusion, however, being reached without prejudice to the right of defendant to answer the

amended complaint and establish such defense as it may have thereto.)

The defendant has no defense to its said breach and that the allegations contained in defendant's answer on file herein to the effect that plaintiff is in default under said written contract, are without merit and are in fact frivolous.

The allegations contained in defendant's counter-claim or cross-complaint purporting to establish a cause of action for reformation of said written contract are not founded upon truth and cannot be supported by evidence."

Plaintiff's motion was supported by the affidavit of Morris Ferer. This affidavit reads as follows:

"State of California, County of Los Angeles—ss.

Morris Ferer, being first duly sworn, upon oath, deposes and says:

1. That he is one of the partners of Aaron Ferer and Sons, plaintiff herein; that the remaining partners are Peggy Ferer, affiant's wife, and Robert Irving Ferer, affiant's son, and that affiant is in complete charge of the co-partnership business; that affiant carried on all of the negotiations between plaintiff and defendant pertaining to the sale by defendant to plaintiff of the equipment which is the subject matter of this litigation.

2. That the written contract executed by the parties hereto and which is the subject matter of this litigation, was drawn and prepared solely by defendant's attorney; that affiant was not represented by counsel in connection with the said written contract; that there was no mistake, mutual or otherwise, or

inadvertence in the preparation of said written contract; that there was no oral contract between the parties relating to the sale by defendant to plaintiff of the producing and refining facilities and equipment covered by said written contract; that there were brief preliminary discussions leading to the execution of said written contract, but that said written contract as executed is in strict compliance with said preliminary discussions.

3. That shortly before the execution of said written contract, affiant met with one Harold Davis, an employee of defendant, and Robert E. Paradise, the defendant's resident attorney, at defendant's premises, and that at said meeting, said Harold Davis and affiant informed said Robert E. Paradise of the desire of defendant to sell and plaintiff to purchase all of the producing and refining equipment and facilities at defendant's Casmelia property, except for certain specific items, which were then and there enumerated; that said Harold Davis requested said Robert E. Paradise to prepare a written contract covering said sale; *that none of the parties at said meeting or at any other time prior to the execution of the written contract made any mention whatsoever of the casing in the oil wells at said premises or to any other specific pipe that was to be conveyed to plaintiff; that the only items of producing or refinery equipment or facilities which were specifically discussed or mentioned were the items that were to be excluded from the conveyance to plaintiff in the written contract as executed; that none of the parties at said meeting or at any other time prior to the execution of said written contract said anything whatsoever with respect to limiting the subject matter of the sale to equipment or facilities on the surface of the land at defendant's*

*premises.* That the words 'on the surface' or any such or similar words were never even mentioned at said meeting or at any time prior to the execution of said written contract.

4. That after the meeting between said Harold Davis, Robert E. Paradise and affiant, said Robert E. Paradise prepared and submitted to affiant a draft of a written contract, purporting to set forth the transaction as it had been outlined at said meeting and there was contained in said draft the following provision:

'Said equipment and facilities so to be sold include all pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors and tanks now located on said land, all subject to the exceptions hereafter provided'

That affiant advised said Harold Davis and said Robert E. Paradise that in his opinion said clause might be construed as a limitation upon the understanding of the parties that the subject matter of the sale was to include ALL of the producing and refinery equipment and facilities except for the items specifically reserved, and affiant suggested that in order to obviate any such construction, the said clause be rewritten as follows:

'Said equipment and facilities so to be sold include all pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors, tanks, METAL AND LUMBER now located on said land, all subject to the exceptions hereinafter provided.'

That affiant's suggestion was accepted by said Harold Davis and said Robert E. Paradise without demurrer or equivocation, and the words "metal and lumber" were added to the clause as aforesaid and are contained in the written contract as executed.

5. That affiant never intended that the subject matter of the sale should be limited to production and refinery equipment and facilities ON THE SURFACE of the premises, or that the subject matter of the sale should not include the casing or pipe in the oil wells on said premises; that neither the defendant nor any of its employees, nor its attorney at any time prior to the execution of said written contract or for a long time thereafter, ever said or did anything whatsoever to indicate to affiant that the defendant intended the subject matter of the sale to be limited to production and refinery equipment and facilities ON THE SURFACE of the premises or that the subject matter of the sale should not include the casing or pipe in the oil wells on said premises; that if defendant intended that the subject matter of the sale was to be so limited or was not to include said casing or pipe, affiant had no knowledge of such intention or any suspicion thereof whatsoever.

That notwithstanding defendant's present contention that the casing or pipe in the oil wells was not to be included in the subject matter of the sale because it was not ON THE SURFACE of the premises, defendant has never questioned plaintiff's right under the written contract to remove a substantial quantity of pipe line which was underground and not ON THE SURFACE of the premises; that in truth and in fact, plaintiff was required to and did, dig trenches throughout the premises to remove such underground pipe.

6. That defendant at no time after the execution of the written contract ever stated to affiant or even intimated that a mistake, mutual or otherwise had been made in the preparation of said written contract by inadvertence or otherwise, until defendant included

allegations to that effect in its answer to the amended complaint on file herein; that in all of the discussions between affiant and defendant concerning the controversy which is the subject matter of this litigation, defendant simply contended that the written contract AS EXECUTED did not include the casing or pipe in the subject matter of the sale.

7. That affiant has never met and does not know Frank A. Morgan, one of the vice-presidents of defendant who verified the counter-claim or cross-complaint of defendant filed herein; that said counter-claim or cross-complaint in setting forth an alleged cause of action for reformation of the contract purports to show a definite oral agreement between plaintiff and defendant excluding the casing from the subject matter of the sale; said Frank A. Morgan by his verification, swore under oath that such an oral agreement was entered into with HIS OWN KNOWLEDGE; affiant is informed and believes and upon such information and belief deposes and says that the said counter-claim and cross-complaint was not verified by any of the employees of defendant who participated in the discussion of the transaction involved in this litigation for the reason that no such person could possibly swear under oath that an oral agreement as set forth in defendant's counter-claim or cross-complaint ever took place."

Affiant further sets forth that the averments contained in paragraph III of defendant's answer, in which it is alleged that plaintiff is in default under the written contract in having failed to remove brick, tanks and other property from defendant's premises, are untrue, because, affiant alleges, since the execution of said contract, the



parties executed an agreement extending plaintiff's time to remove said property and providing for the payment to defendant of a rental of \$50.00 per month until the said work should be completed. Reference is made to a copy of said last named agreement, marked Exhibit "A" and the same is attached to said affidavit. [For said Exhibit A, see Clk. Tr. p. 65.]

The genuineness and due execution of Exhibit "A" were never disputed by defendant. Hence, the allegations of breach of contract by plaintiff contained in defendant's answer were admittedly sham.

**Plaintiff's Motion for Summary Judgment Was Justified and Called for by the Court's Decision Denying Defendant's Motion to Dismiss.**

The Court's denial of the defendant's motion to dismiss the amended complaint *invited* plaintiff's motion for summary judgment.

This is true because in denying the motion to dismiss the Court decided the only substantial issue presented by the defendant's answer and "counterclaim or cross complaint" and *determined that issue adversely to the defendant.*

Said answer had been served and was filed on January 12, 1942. [R. p. 54.] The claimant may move for summary judgment forthwith after service of an answer to his pleading. (Rule 54 (a) 3.1.) If the answer is sham or not substantial the motion is available. (Rule 56, 3.5.2.)

In further presenting the thesis indicated in the caption of this ground for reversal, appellant will first show, in the order to be named the following propositions:

1. That the decision denying the motion to dismiss determined that by the written instrument, which provides the subject matter of this action, the defendant sold and conveyed to plaintiff's the casings in all of the oil wells on defendant's premises;

2. That the defendant's answer raised no substantial issue other than the precise question thus determined by the denial of the motion to dismiss.

**Defendant's Motion to Dismiss Compelled the Court to Decide Whether the Written Contract Was Clear and Unambiguous and Whether It Conveyed the Property in Controversy to Plaintiff, Which Question, the Court Decided.**

The motion to dismiss avers, and was predicated on the proposition that "*the contract . . . does not by its terms provide for the sale by defendant to plaintiff of the casing installed in any of the oil wells located on the premises therein referred to, nor does such contract give to plaintiff the right to remove such casing from any of such wells.*" [See Motion to Dismiss, R. p. 35.]

Defendant's motion, therefore called for and necessitated an interpretation of the contract, itself—wholly without regard to any extrinsic consideration.

Defendant implicitly averred that the contract was clear and unambiguous and that by its terms it excluded said casings in all oil wells on the property described in the contract. If this fact was in doubt declaratory relief was a proceeding expressly provided to avoid more pro-

tracted and expensive litigation. [R. 57 Fed. Rules of Procedure.] The sequence of events is important.

Plaintiff's motion for summary judgment was filed January 30th, 1942 [R. p. 55].

Prior thereto and on November 6th, 1941, defendant gave written notice of motion to dismiss plaintiff's amended complaint and notice of the hearing thereof [R. pp. 35, 36].

Pursuant to said notice said motion was argued on November 17th, 1941, and ordered submitted. [R. p. 37.]

On the 29th day of December, 1941, the court duly denied said motion to dismiss and accompanied its order with a "Memorandum of Conclusions." [R. p. 38.] On January 12, 1942 defendant's answer and counter pleading was filed. [R. p. 54.]

As above stated, defendant's said motion presented the issue and required the court to determine whether by the written contract, the defendant sold and conveyed to the plaintiff the casing in the oil wells on defendant's land described in said contract. Paragraph I of the motion reads:

"To dismiss the amended complaint and both causes of action thereof on the ground that the amended complaint fails to state a claim against Richfield Oil Corporation upon which relief can be granted to the following reason: That the contract attached as Exhibit "A" to the amended complaint does not by its terms provide for the sale by defendant to plaintiff of the casing installed in any of the wells located upon the premises therein referred to, nor does such contract give to plaintiff the right to remove such casing from any of such wells."

The question thus presented is and was the only substantial issue in this law suit. By the "Memorandum of Conclusions" the court definitely determined this pivotal question; in that behalf it said: "The court concludes that under the terms of said contract the defendant sold and conveyed to plaintiff the casing in the oil wells on defendant's land described in said contract." [R. p. 40.] This conclusion was reached, as the "Memorandum of Conclusions" shows, after the court had analyzed the first count of the amended complaint and the written contract (which was made a part of said pleading as "Exhibit A"), and after the court had construed all of the language and each of the provisions of the contract pertaining to the property sold and conveyed through that instrument. That the court so regarded the question presented by the motion to dismiss is unmistakably shown by the "Memorandum of Conclusions" itself.

Therein the court first recites that the "suit arises out of certain written contract, a copy of which is attached to the said amended complaint," and that, by the amended complaint the plaintiff "seeks a decree adjudging that under the terms of said contract the defendant sold and conveyed to plaintiff the casing in the oil wells on defendant's land described in said contract, also adjudging that plaintiff is entitled to remove said casing from said wells and premises, and also adjudging that defendant be restrained from interfering with plaintiff's removal of said casing;" From this point on to the conclusion which has been quoted, the "memorandum" states the substance

of the pertinent provisions of the contract and construes them, emphasizing, the terms and language which clearly reveal the intention of the parties concerning the question presented by defendant's motion. We quote from the memorandum as follows:

“It further appearing from the terms of said contract that defendant thereby agreed to sell to plaintiff, subject to said exceptions, ALL of the equipment and facilities located on said land, together with the pipe lines running from said land to a certain point, and including the boiler, boiler house, two corrugated iron tanks, pump and loading rack located at said point, said equipment and facilities thereby sold to include generally all pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors, tanks, METAL and lumber located on said land; and

“It further appearing from the terms of said contract, more particularly, paragraph one thereof, that certain specifically enumerated and described items of equipment and facilities were expressly excepted as not being sold to plaintiff; and

“It further appearing from the terms of said contract that the casing in the oil wells was not enumerated or described among the items of equipment and facilities thus expressly excepted from said sale; and

“It further appearing from the terms of said contract that plaintiff agreed at its sole expense to perform certain work, and that such work should include, among other things, the dismantling, removal and disposition of ALL equipment, facilities AND OTHER PROPERTY located on said land, EXCEPTING ONLY the items expressly excluded under the provisions of paragraph one of said contract; also that all work to be performed by plaintiff should be per-

formed in strict compliance with all rules, regulations and other requirements of the county of Santa Barbara, the State of California and of any other governmental authorities; and

“It further appearing from the terms of said contract that upon completion by plaintiff of all its duties, liabilities and obligations thereunder, defendant was required to execute and deliver to plaintiff a bill of sale covering ALL equipment and facilities to be purchased by plaintiff thereunder, which bill of should be in GENERAL terms only, inasmuch as no inventory of such equipment and facilities was in existence;”

It thus appears that Judge Holzer not only determined that the written contract constitutes a sale and conveyance of the disputed casings in the oil wells but shows by faultless reasoning, that the provisions of the formal agreement *which was drafted by defendant's attorney were plain and unambiguous.*

**No Other Substantial Issue Was Presented by Defendant's Answer and “Counter-Claim or Cross-Complaint” Than the Exact Question Decided in the Denial of the Motion to Dismiss.**

Appellant will now show, from defendant's pleadings filed in reply to the amended complaint that the assertion contained in the above caption is fully warranted. It will then appear that the “Memorandum of Conclusions,” plus said reply pleadings, provided a perfect *prima facie* case for a summary judgment for the plaintiff, and entitled it to that judgment, unless overcome by evidence supplied by the counter affidavits and depositions produced by the defendant in opposition to the motion for summary judgment.

The answer admitted the execution of the written contract, "Exhibit A" attached to the amended complaint on January 17th, 1941; [Par. I, B., R. p. 42]; Paragraph 1-C of the answer admitted the existence, description and location of the oil wells; that they had been idle as alleged in the amended complaint, that the derricks and tubing and rods had been removed from the wells; that none of the wells were circled in red on the map attached to the contract, and, generally, the answer admitted all of the allegations of paragraph VI of the amended complaint, but qualified the admissions with averments, which if true, excluded the casings in all of the oil wells from the list of equipment sold and conveyed. Finally, said Paragraph I-C alleges as follows:

"Defendant alleges that the casing and pipe installed in said wells was not indicated or shown on said map attached to the written contract and therefore could not be circled in red on said map. Defendant alleges that said map did not add to the subject matter of the contract any items of facilities or equipment not shown in red on such map but that said map was merely illustrative of certain of the exceptions as stated in the contract, to-wit, the facilities and equipment located upon the surface of the premises."

Hence, up to Paragraph II of the answer the only averments of the amended complaint which are challenged are those which show that the casings in the oil wells were sold and conveyed by the written contract, and this issue had been decided contrary to said averments by the "Memorandum of Conclusions." Paragraph III of the answer admits that plaintiff had paid \$22,000.00, the full cash consideration required by the contract. [R. p. 44.]

Paragraphs II and IV, raise an issue as to lack of performance of the contract by plaintiff in the matter of removing brick and other articles from the premises, and, also, join issue on defendant's liability for damages as alleged in Paragraph IV of the amended complaint.

The last mentioned issues, were conclusively shown by "Exhibit A" attached to Morris Ferer's affidavit in support of the motion for summary judgment, to be sham and frivolous. [R. p. 65.]

Also, the question of the liability of the defendant for damages was merely incidental and within the jurisdiction of the court to determine on motion for summary judgment in deciding the substantive rights of the parties to the casing in the oil wells and its removal. However, as above shown, Ferer's affidavit in support of the motion for summary judgment excludes these incidental issues. Hence the answer presented no defense to the motion for summary judgment.

Plaintiff's "counter-claim and cross-complaint" presented no barrier to a summary judgment, for the following reasons:

1. THE COURT HAD DETERMINED IN DENYING THE MOTION TO DISMISS THAT THE DEFENDANT SOLD AND CONVEYED "ALL OF THE CASINGS IN THE OIL WELL TO THE DEFENDANTS BY THE WRITTEN AGREEMENT."

Except for one allegation, set forth in paragraph 1 of Count I of the counter-claim or cross-complaint, that pleading consists of averments of evidentiary facts and pure conclusions, which constitute an attempt to alter the terms of a written contract contrary to the rules of evidence and substantive law. In *Harding v. Robinson*,



Justice Hinshaw quotes with approval from *Pitcairn v. Phillips Hiss Co.* 125 Fed. 110 as follows:

“According to the modern and better view, the rule which prohibits and modification of a written contract by parol, is a rule, not of evidence, but of substantive law.”

The one allegation to which reference has been made reads:

“That on or about January 17, 1941, plaintiff and defendant orally agreed to the sale by defendant to plaintiff, upon certain terms and condition and for the sum of Twenty-two Thousand Dollars (\$22,000.00), of certain producing and refining facilities and equipment which were located upon the surface of certain premises owned by defendant.”

The term “on or about” January 17, 1941, does not allege a *prior* oral agreement. All presumption and intendments require that this language be construed to refer to a time after January 17, 1941.

This is, of course, consistent with the general rule that a pleading is interpreted against the pleader where it is uncertain and indefinite.

But a more potent requirement applies equally. Every presumption and inference is contrary to a construction of any fact or circumstance which would destroy or alter a written instrument, deliberately executed. *Auerbach v. Healy*, 174 Cal. 60. *Burt v. L. A. Olive Grower's Assn.* 175 Cal. 668.

Upon the same grounds this further averment in the same paragraph that “to evidence said agreement the plaintiff and defendant executed a written agreement

dated January 17, 1941" cannot aid the uncertainty in the prior averment.

True, from the latter allegation it might be inferred that the oral agreement was made before January 17, 1941, or before the written contract was drawn, but this would necessitate adopting an inference against the integrity of the written instrument, whereas, the words "on or about" permit an interpretation which would safeguard it from alteration. It is also true that when interpreted as appellant insists it must be, these averments lead to an absurdity. Such a result is of little moment as compared with the importance of adherence to the doctrine and rule of pleading and evidence which circumscribed attacks, even in equity, upon the sanctity of "written instrument."

## 2. THE COUNTER CLAIM OR CROSS-COMPLAINT HAD NO STANDING IN COURT.

It was *Frank A. Morgan*, one of the vice-presidents of the defendant who verified the "counter-claim or cross-complaint." Morris Ferer's affidavit avers that he, Ferer, "has never met and does not know Frank A. Morgan;" That Morgan "swore under oath that such oral agreement was entered into" within "His Own Knowledge" Ferer swore that he, Ferer, "carried on all of the negotiations between plaintiff and defendant pertaining to the sale by defendant to plaintiff of the equipment which is the subject matter of this litigation." [R. p. 59, 63.]

Later the defendant filed counter-affidavits of its officers and employees who did take some part, directly or indirectly, in the said negotiations or who had personal knowledge of them. We refer to the affidavit of F. L. McGahan [R. p. 83]; that of H. H. Kelly [R. p. 89]; a second affidavit by McGahan [R. p. 97]; Harold Davis'

affidavit [R. p. 93]. The defendant also took the depositions of Morris Ferer and of David Zeidenfeld, an employee of plaintiff, and of T. H. Clement, who witnessed a part of said negotiations.

*Not one of these affidavits or depositions whose combined averments cover the range of the entire transaction from beginning to end, mention Frank A. Morgan; not one name him as being present upon any occasion when the subject matter of the contract was discussed with Aaron Ferer or anyone representing the plaintiff, or show that he had any connection, however tenuous, or through any implication, no matter how imaginative or fantastic, with the transaction. Therefore, the sworn statement by Frank A. Morgan in verifying defendant's counter-claim or cross-complaint that he knew of his own knowledge that defendant "orally agreed" upon "terms and conditions" which were different from those set forth in the written agreement was palpably false. Morgan did not know and could not have known of his own knowledge that any oral agreement was made prior to the written agreement.*

Search the affidavits and depositions as we may, for an averment to replace the essential which defendants' sham pleading attempted to supply. Examine them sentence by sentence and word by word. We challenge opposing counsel to point out in any of the affidavits either an allegation that such an oral agreement was ever entered into, or a factual assertion from which that conclusion could be inferred.

For this situation subdivision (e) 3.5.3. of the present Rule 56, provides that the affidavits in support of a motion for summary judgment "shall show affirmatively that the affiant is competent to testify to the matters therein

states," and (e) 3.5.1. requires that the averments shall be on *personal knowledge*. Subdivision (e) 3.5.1., form of affidavits, make the same provision. [See Vol. III Ohlinger's Federal Practice pp. 720, 735, and p. 737.]

It necessarily results that appellant was fully warranted in making its motion for summary judgment; and that since the "counter-claim or cross-complaint," as well as the answer, was sham, defendant's pleadings provided no legal ground for opposition to said motion. Upon this ground alone the judgment should be reversed. However, it will be shown that the same conclusion results for other reasons.

**The Defendant's Showing in Opposition to the Motion for Summary Judgment Was Wholly Insufficient to Provide a Basis for the Conclusion That Any Substantial Defense Had Been Presented:**

Morris Ferer knew and appellant's counsel must have known that no competent proof could be produced and that no legitimate affidavit could be made by any person of *his own knowledge*, either directly or in substance or effect averring that any oral agreement was ever entered into between the parties to this action. Of course defendant's counsel was aware of the fundamental rule that the first requirement and condition precedent to reformation of a contract is proof of the existence of a prior agreement, oral or in writing, because, in order to state a cause of action for reformation, he attempted to set forth an averment to that effect in the "counterclaim or cross-complaint." Hence the counterclaim includes an averment of a prior oral agreement different from the written contract. However as against the motion for summary judgment and the affidavit in support thereof, the mere

averments in defendant's pleading was valueless without evidentiary support. The opposing affidavits and depositions are insufficient for the following reasons:

1. Defendant's said showing was legally inadequate to prove an oral agreement made prior to and different from the one sought to be reformed.

2. No competent evidence was adduced to show that plaintiff was ever apprised of defendant's alleged intention to exclude casings in oil wells from the sale.

1. SAID SHOWING WAS LEGALLY INADEQUATE TO PROVE AN AGREEMENT PRIOR TO THE ONE SOUGHT TO BE REFORMED.

The matter was tried on affidavits and depositions.

In the order in which the opposing affidavits appear in the record the one by F. L. McGahan comes first. [R. p. 83.] The affidavit states that "now and at all times mentioned herein" McGahan was supervisor of store houses for defendant and among his duties, he notified prospective bidders when the defendant "has determined that old or salvage equipment should be sold"; that during August or September, 1940, he informed David Zeidenfeld that Richfield Oil Corporation was planning to take bids for selling certain "surface equipment" at its Casmalia property and that affiant did not then have the items to be sold [R. p. 83]; that "subsequent to said conversation affiant" had a conversation with Morris Ferer in which affiant told Ferer that the equipment to be sold was "surface equipment" and that affiant had no inventory at that time but intended to visit the property and obtain a better idea of specific items to be sold, which informa-

tion would be available to Mr. Ferer [R. p. 84]; that subsequently and some time in the last week of November, 1940, affiant told David Zeidenfeld that he had "more information" about said equipment planned to be sold and showed Zeidenfeld "affiant's penciled memorandum and estimates" and discussed the items and affiant's estimate of tonnage, which was 1,500 tons, a portion of which represented "pipe lines" and the rest of which "represented the other surface equipment." [R. p. 85]; that affiant told Zeidenfeld that his estimate of tonnage might not be accurate; that he told Zeidenfeld that defendant was willing to sell all surface equipment, except certain items which affiant named, and that no mention was made of wells or casing in wells [R. p. 86]; that during the second week in January, 1941, affiant attended a meeting in the office of Mr. Paradise, an attorney for defendant, at which "Morris Ferer and T. H. Clements, Harold Davis and Paradise" were present. That Mr. Ferer asked to have the words "metal and lumber" added "to the proposed contract, and said that "additional material and loose metal and lumber laying around the property" should be included in the property to be sold" which the terms used in the proposed contract did not cover, to which request Mr. Davis agreed, stating that he understood that the articles named by Mr. Ferer were to be purchased by Ferer. That no mention was made at this meeting of casing in any oil wells [R. p. 87]; that Mr. Davis laid a map on the table and pointed out a gas line running from one oil well to the superintendent's house,

which line Davis said would be excluded from the sale so that the house might continue to be provided with gas. [R. p. 88.]

**The Kelly Affidavit.**

Next is the affidavit of H. H. Kelly, defendant's "Director of Purchases." The affidavit states that his duties included "making sales and the execution of contracts for the sale of old and salvage equipment" of defendant's property; that Harold Davis had "no authority to make sales of such nature or to execute contracts of sale of such nature"; that affiant "executed on behalf of" the defendant "the written contract dated January 1st, 1941" between defendant and plaintiff, and that several months before that date affiant notified Davis that "the management" had decided to sell certain "equipment on the Cas-malia property and that Davis should arrange to get bids for the same [R. p. 89]; affiant repeatedly states that he at no time intended to sell casings in any of the wells, or to abandon any of the wells [R. pp. 90, 92]; that it had been and was defendant's intention to produce oil from wells on the property [R. p. 91]; that six large tanks, of the surface equipment, were excluded from the sale for the purpose of storing oil when the wells which had been capped should be restored to production; that affiant "examined carefully the written contract dated January 17, 1941, before he executed the same and that it was affiant's understanding that the phrase "metal and lumber" referred to loose scrap metal and loose lumber but did not include casing in any oil well. [R. p. 92.]

**The Harold Davis Affidavit.**

Harold Davis averred that:

That at all times mentioned he was employed by defendant and it was his duty to arrange "the preliminary negotiations for the sale by Richfield Oil Corporation of its salvage and worn out equipment" [R. p. 93]; that a meeting took place in his office on January 8, 1941, at which were present Messrs. Ferer and Clements and that affiant stated that Richfield management excluded six large tanks from the sale, to be used as storage if Richfield should decide to re-open the field, and affiant did not say that the tanks were to be moved to Maricopa; that affiant was present at a meeting in Mr. Paradise's office, present also were Messrs. Ferer, Clements, McGahan and Paradise [R. p. 94]; Mr. Ferer asked to have loose lumber and loose metal lying around on the property included in the sale, and referred to a scrap pile of wire and cast iron and metal supports for the shell stills around the refinery to be moved by "the Casmite Company"; that affiant stated that it was his understanding that Messrs. Ferer and Clements were to get such articles and it would be satisfactory to include them; that no one mentioned the casings in any oil wells and that affiant asked Mr. Ferer what he referred to when he asked the inclusion of the phrase "metal and lumber" in the proposed contract [R. p. 95]; that affiant pointed out on a large map the gas line leading from one well to the superintendent's house and said that it was to be excluded from the sale, and if the gas was not enough to supply the house, other lines might be excluded for that purpose. [R. p. 96.]



**McGahan's Second Affidavit.**

F. L. McGahan made a second affidavit. [R. pp. 97, 98.] In this he denied that prior to January 17, 1941, he had stated to T. H. Clements that "everything on the property would be sold, with certain exceptions" and avers that he stated to said Clements "that the 'surface equipment' with certain exceptions would be sold."

Affiant denies that he told Clements that storage tanks at Casmalia were to be taken by Richfield to be used at Maricopa [R. p. 97]; denies that Clements ever asked affiant for an inventory of the equipment at Casmalia to be sold; denies that affiant told Clements that he had no inventory but would visit Casmalia and get more information. [R. p. 98.]

**These Affidavits Do Not Even Hint at a Prior Oral Agreement.**

Surely, it cannot be rationally contended that the foregoing affidavits establish an oral contract prior to the one drawn by the defendant's attorney, Mr. Paradise, dated January 17, 1941. Nothing whatever except preliminary negotiations are set forth in any of these affidavits. McGahan's first affidavit as it relates to conversations with Mr. Zeidenfeld shows hardly the beginning of a deal. The first conversation amounted to nothing more than saying that a certain indefinite type of property was apt to be for sale.

The substance of the conversation in November or December was that McGahan said the property would be sold later, but supplied no information on which a bid could be based. His second affidavit shows that he merely had "more information" than on the first occasion, at

which time he had none. The affidavit says a penciled memorandum was shown Zeidenfeld and that "the items" were discussed. All intendments being against any inference or interpretation in aid of an attack upon the written instrument, it cannot be inferred that the added information was material or that the discussion supported defendant's claims herein. It might be classed properly as a cautious sales talk to arouse interest; McGahan, of course, knew that Zeidenfeld's employer was interested in tonnage. Hence on this one point McGahan gave an estimate. No other information approached definiteness in any respect; except for the term "surface equipment" nothing else claimed by McGahan to have been said by him could have any materiality in this case.

Of course, to give these conversations any relevancy would require proof that Zeidenfeld communicated what was said to his employer, because none of the affidavits showed that Zeidenfeld went forward with actual negotiations, and they show that he did not participate in shaping up the sale; also, there is no showing that Zeidenfeld had any authority to negotiate for Ferer & Sons, much less to contract for the plaintiff.

McGahan's alleged statement to Mr. Ferer that the property to be sold was "surface equipment" is of practically no significance as it is stated in the affidavit. The date on which it was made is highly important. If this information had been given immediately before January 17th, 1941, when the contract was about to be drafted, it might possibly put Mr. Ferer on inquiry, although Kelly's affidavit proves that McGahan had no authority to represent Richfield otherwise than to *notify prospective bidders when the Richfield corporation had determined*

*that old or salvage equipment should be sold.* He so stated in his own affidavit, and no one contradicted him.

However, McGahan's affidavit merely states that "subsequent to the last mentioned conversation with David Zeidenfeld" (the one in August or September) McGahan had a conversation with Morris Ferer. Hence, this conversation with Ferer may have been in September or even in August, and the *court was required to presume that it occurred at such an early date*, because where reformation of a written contract is sought *every presumption or inference* is against the party who claims that it was entered into by mutual mistake. Being thus presumed, the negotiation stage had *not* been reached in this transaction.

McGahan's second affidavit is wholly immaterial because no one intending to buy equipment from Richfield was required to pay attention to anything said about the details of a transaction by an employee whose authority extended only to the notification of prospective buyers that property was to be sold. Why should Clement ask such an employee for an inventory when the person authorized to make such sales was Kelly? Also, for all McGahan's, or any of the other affidavits show, Clements may have secured all of the information which he desired through other Richfield officials and by his own inspection. McGahan's statements as to how the term "metal and lumber" came to be inserted in the proposed draft might be material if the "counter-claim or cross-complaint" was based on alleged fraud, but it fails to supply an atom toward making up the clear and convincing evidence which is essential in order that words may be deleted from a written instrument, deliberately executed, where mistake is averred. (Cite cases.)

### The Kelly's Affidavit.

H. H. Kelly's affidavit is relevant and material, even though self-serving, as tending to show that he, as the Richfield official who executed the contract herein involved, did not intend to convey casings in the oil wells. Beyond and aside from this one fact, Mr. Kelly's affidavit helps not at all in the attempt to make out a substantial claim that the said contract should be reformed.

The weight of this affidavit, even for the purpose above indicated, is reduced to a minimum, because Mr. Kelly's affidavit shows that "the managment" and not Kelly decided what should be sold and what equipment should be excluded from the sale, and his assertion in the affidavit concerning the decision and intention of "the management" has no foundation by way of showing that he knew or could have known such intention or decision, and the court had no right to infer or presume anything in support of an attack upon this written instrument, deliberately executed; Mr. Kelly avers that he read the contract carefully before he signed it, from which it must be inferred that it was Richfield's intention that said contract as worded, should convey all property not expressly excluded.

### The Harold Davis Affidavit.

Harold Davis swore that his duty was to act as *preliminary negotiator* for the sale of salvage or worn out equipment for Richfield. [R. p. 93.] This fact substantiates the contention, already made, that McGahan dealings were not even in the negotiation class.

According to the defendant's affidavits, taken together, McGahan merely sent out notices to prospective bidders that sales were to be made; Davis conducted preliminary

negotiations and Kelly closed the deals and executed the contracts under directions from "the management," and no affidavit pretended to say what or who made up "the management."

The statement to Clements and Ferer which Davis said he made, that six large tanks were excluded from the sale to be used for storage if Richfield should decide to re-open the field, merely tends to show that Richfield might have been undecided as to whether it would ever re-open the field. Assume that this was true; suppose that Clements and Ferer knew that this was the state of mind of the Richfield management; even assume that some authorized person had said to Clements and Ferer: Richfield intends to re-open the Casmalia field if and when prices of its low grade oil will make it profitable, in what possible manner would that information concern a prospective purchaser of equipment which Richfield was offering to sell? Since what date or era in the development of the common law has the responsibility of guardianship of a vendor been saddled on the vendee? Did Ferer and Clements owe some duty, perhaps, to Richfield stockholders, to unravel the intricacies of the Richfield organization set up, and to find out who constitutes "the management" and then to warn such personnel that it would not be advisable to sell well casings unless it had been finally and conclusively determined that the Casmalia field should be forever abandoned and rendered desolate like the sacred soil of Prussia before an advancing Russian Army?

Truly, the sublimity of the standard of business ethics necessarily assumed to impute any material meaning to knowledge upon defendant's part that Richfield manage-

ment might sometime re-open a field which had been closed for a decade, arrives within the realm of the ridiculous when regarded in the light of common knowledge and experience in the buying and selling of goods of any character. For similar reasons the fact that Richfield was retaining a gas line from a well to the Superintendent's house cannot rationally be regarded as an indication that Richfield did not intend to sell the casings from the capped oil wells. To the head of a concern whose business it is to buy discarded equipment containing metal wherever it is for sale, the vendor's reasons for selling one article and retaining another go in one ear and out of the other as so much tedious talk. It must be remembered that all of these defense affidavits were filed in answer to the affidavit of Morris Ferer in support of plaintiff's motion for summary judgment. In Ferer's affidavit [R. pp. 59, 60], he swore that upon the very occasion referred to by Davis, "said Harold Davis and affiant informed said Robert E. Paradise of the desire of the defendant to sell and plaintiff to purchase *all of the producing* and refining equipment and facilities at defendant's Casmalia property, except for certain items which were then enumerated; that said Harold Davis requested said Robert E. Paradise to prepare a written contract covering said sale; *that none of the parties at said meeting* or at any other time prior to the execution of the written contract *made any mention whatsoever of the casing in the oil wells at said premises* or of any other specific pipe that was to be conveyed to plaintiff; that the *only items* of producing or refinery equipment or facilities which were specifically discussed or mentioned *were the items that were to be excluded* from the conveyance to plaintiff in the written contract as executed.

Harold Davis made and filed his affidavit and he failed to deny the foregoing averments in Mr. Ferer's affidavit. Mr. Paradise filed no affidavit and, of course, failed to deny said averments by Mr. Ferer. Even without the aid of the rule which requires that all intendments must be favorable to upholding the integrity of a written instrument the total failure to deny by both Davis and Paradise compels the conclusion that Ferer's said averments are true. Such being the condition of the negotiations during this meeting, held just prior to the drafting of the written agreement, such circumstances as the gas line conversation and the possibility that Richfield might sometime re-open the Casmalia field, shrivel into the mere shadow of a speck as evidence of anything material in this case—the material facts being that defendant did not intend to convey the oil well casings and that plaintiff knew or suspected such lack of intention on the part of the Richfield management. As circumstances tending to prove the oral agreement alleged in defendant's sham pleading, they are nil.

Harold Davis' affidavit also asserts that no one at this meeting "mentioned the casings in any oil wells." In this instance Ferer's affidavit contains the same statement. Whose business was it to mention the casings since Ferer understood and the contract as drawn provided that they were to be included in the conveyance as a part of the producing equipment, *all* of which was to be sold, *unless expressly excluded?* Davis understood the same thing, which understanding on his part was fully proven by Ferer's *undenied* affidavit. Obviously there was no occasion for Ferer or Clements to mention casings in oil wells, and it is just as clear that, under the

above circumstances, the failure of Davis to name such casings among the excluded articles was an implied representation that they were to be sold and conveyed.

This concludes our analysis of the affirmative allegations of the defendant's opposing affidavits and of the material negative assertions therein.

However, the failure of the defendant through its affidavits to deny other averments in the affidavit of Morris Ferer totally eliminates the purported issues raised through the answer and "counterclaim or cross-complaint," as constituting any substantial barrier to the entry of summary judgment in favor of the plaintiff.

The undenied averments of Mr. Ferer's affidavit are:

" . . . that affiant carried on all of the negotiations between plaintiff and defendant pertaining to the sale by defendant to plaintiff of the equipment which is the subject matter of this litigation.

"2. That the written contract executed by the parties hereto and which is the subject matter of this litigation, was drawn and prepared solely by defendant's attorney; that affiant was not represented by counsel in connection with the said written contract; that there was no mistake, mutual or otherwise, or inadvertence in the preparation of said written contract; that there was no oral contract between the parties relating to the sale by defendant to plaintiff of the producing and refining facilities and equipment covered by said written contract. . . .

"3. That shortly before the execution of said written contract, affiant met with one Harold Davis, an employee of defendant, and Robert E. Paradise, the defendant's resident attorney, at defendant's premises, and that at said meeting, said Harold Davis



and affiant informed said Robert E. Paradise of the desire of defendant to sell and plaintiff to purchase all of the producing and refining equipment and facilities at defendant's Casmelia property, except for certain specific items, which were then and there enumerated; that said Harold Davis requested said Robert E. Paradise to prepare a written contract covering said sale; *that none of the parties at said meeting* or at any other time prior to the execution of the written contract *made any mention whatsoever of the casing in the oil wells at said premises* or to any other specific pipe that was to be conveyed to plaintiff; that *the only items that were to be excluded* from the conveyance to plaintiff and that *all of the items* so specifically mentioned *were excluded* from the conveyance to the plaintiff in the written contract as executed;"

\* \* \*

"4. That after the meeting between said Harold Davis, Robert E. Paradise and affiant, said Robert E. Paradise prepared and submitted to affiant a draft of a written contract, purporting to set forth the transaction as it had been outlined at said meeting and there was contained in said draft the following provision:

" 'Said equipment and facilities so to be sold include all pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors and tanks now located on said land, all subject to the exceptions hereafter provided.'

That affiant advised said Harold Davis and said Robert E. Paradise that in his opinion said clause might be construed as a limitation upon the understanding of the parties that the subject matter of the sale was to include ALL of the producing and refinery equipment and facilities except for the items

specifically reserved, and affiant suggested that in order to obviate any such construction, the said clause be re-written as follows:

“ ‘Said equipment and facilities so to be sold include all pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors, tanks, METAL AND LUMBER now located on said land, all subject to the exceptions hereinafter provided.’

That affiant's suggestion was accepted by said Harold Davis and said Robert E. Paradise, without demurrer or equivocation, and the words ‘metal and lumber’ were added to the clause as aforesaid and are contained in the written contract as executed.

“5. That affiant never intended that the subject matter of the sale should be limited to production and refinery equipment and facilities ON THE SURFACE of the premises, or that the subject matter of the sale should not include the casing or pipe in the oil wells on said premises; that neither the defendant nor any of its employees, nor its attorney at any time prior to the execution of said written contract or for a long time thereafter, ever said or did anything whatsoever to indicate to affiant that the defendant intended the subject matter of the sale to be limited to production and refinery equipment and facilities ON THE SURFACE of the premises or that the subject matter of the sale should not include the casing or pipe in the oil wells on said premises; that if defendant intended that the subject matter of the sale was to be so limited or was not to include said casing or pipe, affiant had no knowledge of such intention or any suspicion thereof whatsoever.

“That notwithstanding defendant's present contention that the casing or pipe in the oil wells was not to be included in the subject matter of the sale because

it was not ON THE SURFACE of the premises, defendant has never questioned plaintiff's right under the written contract to remove a substantial quantity of pipe line which was underground and not ON THE SURFACE of the premises; that in truth and in fact, plaintiff was required to and did, dig trenches throughout the premises to remove such underground pipe.

"6. That defendant at no time after the execution of the written contract ever stated to affiant or even intimated that a mistake, mutual or otherwise had been made in preparation of said written contract by inadvertence or otherwise, until defendant included allegations to that effect in its answer to the amended complaint on file herein; that in all of the discussions between affiant and defendant concerning the controversy which is the subject matter of this litigation, defendant simply contended that the written contract AS EXECUTED did not include the casing or pipe in the subject matter of this sale.

"7. That affiant has never met and does not know Frank A. Morgan, one of the vice-presidents of defendant who verified the counter-claim or cross-complaint of defendant filed herein; that said counter-claim or cross-complaint in setting forth an alleged cause of action for reformation of the contract purports to show a definite oral agreement between plaintiff and defendant excluding the casing from the subject matter of the sale; said Frank A. Morgan by his verification, swore under oath that such an oral agreement was entered into with HIS OWN KNOWLEDGE; affiant is informed and believes and upon such information and belief deposes and says that the said counter-claim and cross-complaint was not verified by any of the employees of defendant who participated in the discussion of the transaction involved in

this litigation for the reason that no such person could possibly swear under oath that an oral agreement as set forth in defendant's counter-claim or cross-complaint ever took place.

"4. That defendant's allegation that plaintiff is in default under the terms and provisions of the written contract is untrue; that the written contract provides that if plaintiff does not remove the equipment which is the subject matter of the sale within six months from the date of the execution of the said written contract, plaintiff shall be required to pay the defendant rental for the premises until the work has been completed, at the rate of \$50.00 a month; that defendant orally agreed to waive said rental when, for certain reasons beyond the control of plaintiff it became apparent that plaintiff would require more than six months time in which to perform said work; that the period for which the said rental was to be so waived by defendant was not definitely fixed by the oral agreement aforesaid, but plaintiff and defendant entered into a written agreement on or about the 6th day of January, 1942, wherein it was agreed that plaintiff would have until the 7th day of March, 1942, in which to complete said work, and if not completed, plaintiff would thereafter be required to pay defendant rental at the rate of \$50.00 a month until the work was completed; a copy of said written agreement is hereto attached, marked 'Exhibit A' and made a part of this affidavit by reference.

Morris Ferer (Sgd)."

[R. pp. 59-66.]

Then followed said "Exhibit A", dated January 6, 1942, which stipulates that if Ferer & Sons shall not have removed the property purchased by March 7, 1942, the said purchaser should pay the seller \$50.00 per month

for as long a period "as is required to do all the work above referred to," and it was stipulated that failure of defendant to set forth any claim against plaintiff for damages by reason of plaintiff's failure to remove said property as agreed in the written contract in any counter-claim or cross-complaint to be filed in the instant action would not be a waiver of defendant's claim thereto, said "Exhibit A" being signed by both plaintiff and defendant herein.

Appellant insists that the foregoing undenied averments must be accepted as true; that the trial court disregarded them; that had it done otherwise a summary judgment was compelled as a matter of law. The compulsion of law necessarily results from the following legal propositions:

It is held by the Supreme Court in *Fidelity & Deposit Company v. United States*, 187 U. S. 315, 47 Fed. 194, that undenied statements made in affidavits to support or oppose a motion for summary judgment are to be taken as true. Also, so holding, are *Griffith v. Mass. Mutual Life Insurance Co.*, 96 F. (2d) 57 (C. C. A. 2); and *Bernstein v. Kritzer*, 224 App. Div. 287, 231 N. Y. S. 97. And the following principles of law which are directly applicable: Evidence which is not contradicted by positive testimony or circumstances, and is not inherently improbable, or incredible, cannot be arbitrarily or capriciously discredited, disregarded or rejected, even though the witness is a party or is interested. (*Caldwell v. Weiner*, 203 Cal. 543, 264 Pac. 1100; *Lejeune v. Gen. Pet. Co.*, 128 Cal. App. 404, 18 Pac. (2d) 429; *Rogers v. Burnham*, 140 Cal. App. 366, 35 Pac. (2d) 329; 32 C. J. S. 1089, 1090, 1091.)

Uncontradicted testimony of a witness to a particular fact should be accepted by the court as proof of such fact.

(*Davis v. Judson*, 159 Cal. 121, 113 Pac. 147, 150.) To same effect, *Briggs v. Cameron* (Cal. App.) 295 Pac. 347, 349; *Sun Maid etc. v. Papasian* (Cal. App.) 240 Pac. 47, 50; *Hutchison v. Holland*, 47 Cal. App. 710, 190 Pac. 1072, it is said: "Where testimony of the defendant stands uncontradicted and his statements are not inherently improbable a trial court is not authorized to disregard them." The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason. (C. C. P., Sec. 1844.)

The written agreement speaks for itself. No more convincing or authoritative source can be quoted to show that, by clear and unambiguous language it purports to convey the casing in all of the oil wells on the Casmalia property, than Judge Holzer's memorandum opinion, rendered in denying defendant's motion to dismiss the amended complaint. In construing said contract, Judge Holzer said:

"It further appearing from the terms of said contract that defendant owned the refinery and producing facilities and equipment located on said land, that plaintiff desired to buy such equipment and facilities, subject to certain exceptions more particularly set forth in said contract, that defendant was willing to sell the same upon the condition that plaintiff should dismantle and remove the same in accordance with the terms set forth in said contract; and

It further appearing from the terms of said contract that defendant thereby agreed to sell to plaintiff, subject to said exceptions, ALL of the equipment and facilities located on said land, together with the pipe lines running from said land to a certain point,

and including the boiler, boiler house, two corrugated iron tanks, pump and loading rack located at said point, said equipment and facilities thereby sold to include generally all pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors, tanks, METAL and lumber located on said land; and

It further appearing from the terms of said contract, more particularly, paragraph one thereof, that certain specifically enumerated and described items of equipment and facilities were expressly excepted as not being sold to plaintiff; and

It further appearing from the terms of said contract that the casing in the oil wells was not enumerated or described among the items of equipment and facilities thus expressly excepted from said sale; and

It further appearing from the terms of said contract that plaintiff agreed at its sole expense to perform certain work, and that such work should include, among other things, the dismantling, removal and disposition of ALL equipment and facilities to be purchased by them, also the filling in and leveling off of all ditches and pits created by their work in removing pipe or other equipment, also that in addition plaintiff should remove from said land ALL equipment, facilities and OTHER PROPERTY located on said land, EXCEPTING ONLY the items expressly excluded under the provisions of paragraph one of said contract; also that all work to be performed by plaintiff should be performed in strict compliance with all rules, regulations and other requirements of the

county of Santa Barbara, the state of California and of any other governmental authorities; and

It further appearing from the terms of said contract that upon completion by plaintiff of all its duties, liabilities and obligations thereunder, defendant was required to execute and deliver to plaintiff a bill of sale covering ALL equipment and facilities to be purchased by plaintiff thereunder, which bill of sale should be in GENERAL terms only, inasmuch as no inventory of such equipment and facilities was in existence;

It further appearing from the affidavit of one H. H. Kelly, filed herein on behalf of defendant, and from the statement made by defendant's counsel in open court, that defendant has notified plaintiff that the former contends that it did not sell to plaintiff said casing, also contends that plaintiff is not entitled to remove said casing, and has also notified plaintiff that defendant intends to and will prevent plaintiff from removing said casing; and

It further appearing that by the second count of said amended complaint plaintiff seeks damages against defendant for its alleged breach of the aforementioned contract; and

It further appearing from the statement made by defendant's counsel in open court that said contract was drafted and prepared by defendant;

The Court concludes that under the terms of said contract the defendant sold and conveyed to plaintiff the casing in the oil wells on defendant's land described in said contract."



### Summary.

It has been shown that defendant's answer and "counterclaim or cross-complaint" attempted to avoid the effect of said memorandum opinion and the averments of the amended complaint solely by seeking to reform said contract on the sham ground of a formal oral agreement and mutual mistake and the equally sham averments of damages for plaintiff's delay in removing the purchased property.

It has further been pointed out that defendant's answer and counter-claim or cross-complaint could perform no function for any purpose. They raise no issue. They were verified by a person who, it is conclusively shown, had no personal knowledge of the averments contained therein and was not qualified to testify as to the matters therein set forth, rendering said pleadings frivolous and sham. (Rule 56 (3.7), Federal Rules of Procedure.)

It has been shown, item by item, that the facts and circumstances set forth in defendant's affidavits in opposition to plaintiff's motion for summary judgment, are either meaningless or susceptible of an interpretation which upholds the written contract and which is wholly inconsistent with the existence of the verbal agreement described in defendant's pleadings.

The undenied averments of the affidavit of Morris Ferer alone, preclude the inference or conclusion that such a verbal agreement was ever entered into by the parties and fully support the written contract as expressing the true intention of both parties.

There remains only the depositions of Morris Ferer, T. H. Clement and David Zeidenfeld to be considered to complete the record upon which the motion for summary

judgment was denied. It will readily appear that these depositions help defendant's cause not at all, but do add substantially to the proof that no prior oral agreement at variance with the written contract was ever created by the parties hereto.

### **The Depositions.**

Mr. Zeidenfeld's deposition occupies pages 616 to 712, inclusive, of the Record. Very little of it need be quoted to show: 1. That Zeidenfeld had no authority to bind the plaintiff; and no statement made by him could constitute notice to plaintiff; 2. That his part in the transaction did not reach the stage of negotiation; 3. That he conveyed no material information to plaintiff.

Direct examination by Mr. Paradise:

Mr. Zeidenfeld testified that during 1940 and 1941—

“I was employed by Aaron Ferer & Sons as buyer of scrap material [R. p. 617]; about the middle of September, 1940, I had a conversation with Mr. McGahan; he said, ‘I think we are going to have a pretty good size deal to work on . . . it isn't exactly ready yet, but I will let you know when it comes up.’ All I remember at that time that Mr. McGahan mentioned was our oil refinery. At that time there was supposed to be a lot of various types of refinery and producing equipment. [R. pp. 618, 619.] I remember saying to Mr. Ferer that there was a Richfield deal coming up, a fairly good sized deal, but nothing about Casmalia. [R. p. 623.] I don't think it, the conversation, took 30 seconds. It was just dropped until a future date. [R. p. 629.]

Another conversation with Mr. McGahan occurred on November 28, 1941; I was there on another deal. The nature of the equipment that was mentioned was a lot of pipe, pipe lines was mentioned. [R. pp. 626, 627.]

I believe he mentioned the refinery has a lot of pipe lines and other items to be sold; I don't think the word, 'surface equipment' was ever used. [R. p. 629.] I don't believe I heard the mention of casing at that time. The word 'pipe' itself, to an average fellow in the junk business, whether casing or just a line of pipe is designated, it is so many tons of pipe [R. p. 630]; I don't remember the words 'surface equipment' being used by Mr. McGahan. [R. p. 631.]

Mr. McGahan showed me those sheets (reference being to ten penciled memo sheets). He had them in his book. I remember the total estimate, 1,500 tons; I was primarily interested in this 1,500 estimate [R. p. 635]; to tell you the truth, I did not know the difference between pipe line and casing at that time; just a few days ago I was told that casing was casing in oil wells. I have heard "casing" used many times. I am not exactly an oil man, and I never knew a lot of terms, and I can't determine whether it is pipe that goes up and down, or goes straight across. I wouldn't say the pages were all shown to me, he might have thumbed through all of them, but I took no heed of how many pages there were [R. p. 645]; I kept repeating over and over to him 'how many tons are there?' He showed me the pages; I saw just two or three of them. [R. p. 643.] Mr. McGahan stated, roughly there was 1,500 tons of both steel and pipe. [R. p. 648.] After this conversation I think I spoke to Mr. Ferer about so many tons of pipe up there, and so many tons of steel. [R. p.

651.] I think this was before the bid was submitted to Richfield. I knew the bid was submitted after it was submitted. [R. p. 652.] A week or maybe two weeks after that I mentioned to Mr. Ferer that it would take somewhere around \$20,000. I just came into the office where he and Mr. Clements were discussing certain things. [R. p. 653.] There was not any mentioned of tonnage. I think at that time I was out of the picture entirely. I was not consulted about it.” [R. p. 654.]

Cross-examination by Mr. Sturzenacker :

“I was never at the Casmalia property [R. p. 658]; in the second conversation with Mr. McGahan the tonnage figures he gave me were merely an estimate; he told me if Ferer & Sons were interested they should go up and look at the property; he gave me the route to take up there. [R. p. 661.] I did not go with Mr. Ferer to see the property. [R. p. 670.] I think I told Mr. Ferer, if he was interested in this deal, I would go and look at it, *but I think somebody else entered the picture and either that somebody had gone and looked at it already.* It is a fact that after my casually mentioning this possible deal to Mr. Ferer, he carried on his negotiations and the purchase in connection with the deal, *without me*; the day after he was up there I heard about it. After that he had no discussions with me [R. p. 670]; Mr. McGahan did tell me that there were a few things on the property that Richfield did not want to sell [R. p. 673]; I don’t recall anything mentioned of pipe in oil wells. I am sure that did not take place. I don’t

think we discussed anything about 'on top or under' at all. There was no mention concerning oil wells on the property." [R. p. 675.]

Redirect examination:

"When Mr. McGahan gave me his estimate of 1,500 tons, it was 900 tons of pipe lines and the balance approximately 600 tons of steel. [R. p. 680.] In reference to what Mr. McGahan told me about pipe lines, there was no mention of vertical or horizontal." [R. p. 695.]

The greater part of Mr. Zeidenfeld's deposition is consumed by answers to questions as to what he understood, and what he "pictured in his mind" and to his inferences and assumptions from what Mr. McGahan said to him. These answers have been omitted, because, since neither from his testimony or from any other source is there the slightest evidence that Mr. Zeidenfeld communicated his understanding, or inferences or presumptions or mental visions to anyone, all such testimony is and was so palpably incompetent that no jurist could be charged with having considered it. Concerning the material matters the foregoing is the substance of Mr. Zeidenfeld's deposition. We do not apprehend that opposing counsel will claim that Mr. Zeidenfeld took any material part in the negotiations or that plaintiff is bound or affected in any way by his mental pictures or understandings. Nothing that transpired between him and Mr. Ferer can cast any light upon the latter's understanding or intentions.

**The Deposition of T. H. Clements.**

Direct examination by Mr. Paradise:

"I am sole owner of the Refinery Equipment Company, second-hand dealer in machinery, pipe, etc., and buy and sell junk equipment. Aaron Ferer & Sons is more or less competitive to our business. My interest in this transaction was as a promoter, sharing in the profits. [R. pp. 713, 714.] I have a written contract with Morris Ferer. I get  $33\frac{1}{3}\%$  of the profits, providing the equipment and trucks for the salvage work. [R. p. 715.] I have the histories and drillers' reports of the Richfield wells on the land described in the contract dated January 17, 1941; also the log books and the records of production and records of plugging [R. pp. 720, 721]; I examined them while negotiations for this contract was going on [R. p. 723]; I had discussed the desire of Richfield to sell equipment from the property for 3 or 4 years with Mr. McGahan, and with Mr. Davis, who I was buying equipment through [R. p. 727]; around September, 1940, Mr. Davis told me he was having Mr. McGahan make out an inventory and would be ready to take bids afterward; some time in November he told me to contact McGahan [R. p. 729]; I talked with McGahan in December, 1940. He said they wanted to sell everything except six big storage tanks and some equipment that had been sold [R. p. 730]; he said they wanted to take the six tanks to Maricopa. Next I called Mr. Ferer and asked if he would be interested in the deal. He said yes. [R. p. 731.] Mr. Ferer and I inspected the property about the middle of December, 1940. We spent a whole day. We examined the various tanks. We figured steel plate at \$15.00 a ton [R. pp. 734, 735]; we estimated an over-all tonnage of about 6,000 tons,

metal materials. We didn't figure the tanks in that. [R. pp. 737, 738.] Our top figure was about 6,000 and minimum of 3,000 to 3,500 tons. When we figured pipe in those wells it was indefinite; we might get 50,000 feet out of 100,000 feet [R. p. 741]; there was a lot of scrap pipe and loose cable. We didn't figure the galvanized material as loose; we figured to sell it as buildings. [R. p. 743.] In our conversation with Mr. Davis those steel settings, 8-inch back stays was included in the sale. It was stipulated. It occurred the last time in your presence at this desk [R. p. 744]; the vast majority of the casings was 10 inch pipe, by the drilling logs [R. p. 747]; we checked the blueprint and counted the wells and verified their existence; used the map Duncan gave us [R. p. 749]; we based our estimate of 50,000 feet recoverable on the amount we could get out of the well and still comply with the abandonment program set forth by the State Bureau of Mines, their rules and regulations. [R. p. 752.] The number of wells was around 60 or 67 [R. p. 754]; we figured 50 wells for certain [R. p. 762]; I was never told at any time that Richfield intended to retain the wells or the casing in the wells. [R. p. 769.] The wells were not abandoned when Anderson tore down the derricks and pulled the tubing. [R. p. 769.]

He couldn't use the same rigging to remove the casings [R. p. 771]; I participated with Mr. Ferer in determining the sum of \$22,000 to be offered to Richfield for the equipment and facilities to be sold; as to how we arrived at that figure—the initial investment isn't all cost in removal of that sort. Your abandoning operations cost you a considerable amount of money and we looked it over and determined what we thought we could realize back in dollars and cents and how much we could afford to gamble on it. After

all, it is a gambling operation. You don't know the nature of all of your underground piping and you can't even tell about all of the things that you do look at, as to whether it will be merchantable merchandise or not. [R. p. 780.] I have forgotten what we figured it would cost to clean up the property. We were gambling on this [R. p. 782]; we figured to make a profit of \$50,000 to \$60,000 on this deal. [R. p. 785.]

In our discussion with any Richfield representative no mention of the casings in the wells was ever mentioned. [R. p. 786.]

We estimated the cost of abandoning the wells in the general cost [R. p. 787]; when you go into a well to remove the casing it is like a pig in a poke. You just work on the law of averages [R. p. 796]; the oil produced at Casmalia is very heavy gravity [R. p. 797]; I didn't know whether the field was entirely depleted when they stopped producing in 1925 or 1926 [R. p. 798]; if we bought everything on the property in the way of pipe, there was no obligation as to abandonment, as long as we had paid cash for it, between ourselves and Richfield. The obligation would be to straighten out any difficulties in the abandonment between ourselves and the Bureau of Mines. [R. p. 803.]

When the Richfield say they want to sell everything on the property and they are going to go ahead and make a good piece of cattle grazing land out of it and are even going to take the storage tanks off of the property—the idea of considering it as a future, potential source of oil never entered our heads.

In your contract there it stipulates that you have got to be very careful to keep the fences up for cattle.



What I have stated was the conversation held in this room and you were present. Mr. Davis and Mr. Ferer and myself were present.

If the property was going to be used for oil production, why would they remove from it production tanks, pipe lines, loading rack facilities, boiler facilities and house facilities? Why would everything be removed from the property?

Those are the questions that led us to form definite conclusions. I was acquainted with the conditions of those boilers and tanks at the time this contract was made.

The pipe lines were perfect. Tanks, some were good and some were bad. The boilers for the purpose for which they were used primarily, which was for heating purposes on these gut lines, some could be used another 50 years. Most of the boilers had been put in there from 1917 to 1925. I didn't think that the Richfield considered the field as undepleted. I thought that was a fifth wheel they had accumulated from the Doheny interests when they bought it over and that they were sorry they had it. [R. p. 808.]

I read the contract right here along with Mr. Ferer at the time it was signed [R. p. 813]; Mr. McGahan never pointed out the excluded gas lines before or after the contract was signed [R. p. 814]; I asked McGahan for an inventory but he said, 'I can't give you one.' He never did [R. p. 815]; neither McGahan nor Davis ever stated to me that those six excluded tanks were to be left on the property for future production purposes. I recall but one conversation when you were present. We had a prior meeting in Mr. Davis' office, Mr. Ferer, Mr. Davis, myself and perhaps Mr. McGahan were present [R.

p. 817]; the whole conversation was the items excluded. At no time was discussed the items particularly which were being sold.

I never inquired of any Richfield employee at that meeting concerning the wells or the casing in the wells no more than we ever discussed the character of the tanks or the character of the pumps or the character of the brick. None of that was discussed. [R. p. 818.]

Following that was a meeting in your office [R. p. 818]; yourself, Mr. Davis and Mr. McGahan, I think, and Mr. Ferer and myself were present [R. p. 819]; Mr. Ferer and I read the contract [R. p. 819]; after reading the contract, Mr. Ferer requested certain changes. [R. p. 819.]

We were not discussing scrap metal at that conversation that I remember [R. p. 821]; as I recall it, Mr. Ferer spoke to Mr. Davis in this chair over here and said, 'Mr. Davis, this contract includes everything on that property, so, to clarify that, can we not have this paragraph changed and the words "all metal and lumber" added to it to clarify the whole issue?' And I think Mr. Davis turned around to you and said, 'Well, I don't see any objection,' and I think you agreed with him. I think that is the way the thing occurred. [R. pp. 821, 822.] We merely said metal would include everything there on the property [R. p. 822]; two-thirds of the pipe lines which we were buying were buried underground [R. p. 823]; they were not exposed; some of them were exposed. [R. p. 823.] There was no conversation held by me and I don't believe by Mr. Ferer outlining the all-inclusive items which would be included under the words 'metal or lumber.' There was no mention whatsoever of either the casing in the wells

or the wells themselves [R. p. 828]; nor the tanks nor the valves nor the fittings [R. p. 829]; Mr. Ferer said, as I recall, 'In this warehouse there are nipples and valves and fittings in the warehouse stock. They are not included in the contract. There are lots of items like that. And, if we don't have this all-inclusive paragraph, you haven't got a definite contract.' [R. p. 830.]

I am a graduate of the University of California in petroleum technology and I have specialized in it. We think of casing in terms of the purpose for which we are going to apply it after we get it. [R. p. 831.]

Neither Mr. Davis nor Mr. McGahan or any other official or employee of Richfield Oil Corporation ever told me prior to the execution of the contract that Richfield Oil Corporation did not intend to sell the pipe in the oil wells on the property [R. p. 832]; prior to my taking Mr. Ferer to the property and prior to the execution of the contract neither Mr. Davis nor Mr. McGahan or any other official or employee of the Richfield Oil Corporation ever told me that they intended to sell only such producing and refining equipment as was upon the surface of the property up there; I did not have any knowledge from any source whatsoever and I did not suspect that it was the intention of the Richfield Oil Corporation in signing this contract not to include in the conveyance to Aaron Ferer & Sons the pipe in the wells on the property [R. p. 833]; the only contract that I have any knowledge of between Richfield Oil Corporation and Aaron Ferer & Sons relating to the sale by Richfield Oil Corporation and the purchase by Aaron Ferer & Sons of producing and refinery equipment and facilities on the Casmalia property is the contract expressed in the written contract dated

January 17, 1941 [R. p. 834]; Mr. Morris Ferer prepared a check, which I believe was a cashier's check, and, as I recall, I was with him when we came up and gave it to Mr. Harold Davis. [R. p. 839.] The occasion when that telephone call was made from Mr. Davis' office was the day when I came up with Mr. Ferer and Mr. Ferer gave the check to Richfield Oil Corporation [R. p. 839]; Mr. Davis then said, 'Well, we will note down our understanding of what is to go for this consideration,' and I believe that he turned around to the typewriter and at that time knocked off a memorandum and gave it to Mr. Ferer, outlining what was to be included in the contract which Mr. Paradise was to draw. [R. p. 840.]

(The witness was shown a paper which purported to be a typed memorandum bearing the heading, "Sale of Material and Equipment at Casmalia," and appearing to have the initials in the lower left-hand corner of the dictator, "H. P. D.," bearing the date January 8, 1941, in the lower left-hand corner.)

That is the memorandum which Mr. Davis prepared. It is marked as Plaintiff's Exhibit 1 for identification. This meeting in Mr. Paradise's office was around January 14th or 15th. At the time that Mr. Davis handed this paper to me, I noticed in it this clause, 'Everything will be sold to the above with the exception of the following:' [R. p. 840.]

At that time it was my understanding that the deal between Aaron Ferer & Sons and Richfield Oil Corporation was that Aaron Ferer & Sons were buying everything on the property by way of production or refinery equipment or facilities except the items specifically excluded on this memorandum."

Deposition of Morris Ferer.

Direct examination by Mr. Paradise:

Mr. Ferer's testimony is substantially the same as that of Mr. Clements with respect to the incidents which both covered. Mr. Ferer:

"Aaron Ferer & Sons is a co-partnership engaged in scrap metal business, usable machinery and equipment, etc. I have charge of the business and determine its business problems [R. p. 845]; I was unable to obtain sufficient information from Richfield to calculate the job; one time I spoke to Mr. McGahan and asked him if there was any information or inventory regarding that job and he said no; that they didn't have an inventory that was up to date and that it was up to us to go out there and check it ourselves; he didn't refuse, he may have said there was no current inventory [R. pp. 848, 849]; I didn't ask him about tonnage; I felt he wasn't familiar with it or didn't know about it. I didn't ask any other employee of Richfield about it. [R. p. 851.]

I first learned that Richfield proposed to sell certain equipment and facilities at Casmalia in late November or early December, from Mr. Clements [R. p. 852]; we went to the property and inspected it; saw Mr. Duncan there; got a map of the property from Duncan [R. pp. 854-857]; spent possibly a half hour with Duncan; Ferer and Clements stayed 'the whole day.' "

Ferer said:

"I couldn't see the pipelines because 'it was underneath the ground' [R. p. 858]; 'some were exposed' but the 'major part was underground'; 'I have been in this business 25 years or more'; I have figured

lots of jobs but never one like this; because in other jobs the machinery or other things are in front of you and you can at least get an idea in estimating [R. pp. 860-861]; I took it for granted Mr. Clements knew his business—it was completely unknown to me. He told me the wells should produce a minimum of 50,000 feet, possibly 100,000 [R. p. 863]; I never had any conversations with any Richfield employee except this one with Mr. McGahan and a short one with Duncan; the one with McGahan was prior to January 8th, 1941; neither the wells or casings were mentioned by McGahan [R. p. 866]; I took Mr. Clement's figures in estimating the pipe to be taken from the wells. He stated that there were some state laws to be complied with in abandoning oil wells. [R. p. 869.] He did not inform me in detail about the recoverable casing or about rigging up or cost of abandonment of oil wells or how the abandoning would be done. [R. pp. 870-871.]

In figuring tonnage we lumped it all together. Our estimate was somewhere from 3,000 to 6,000 tons—including everything on the property, producing equipment and refinery, etc. [R. p. 872]; there was a negligible amount of loose metal lying around. It was rusty and twisted. It can be sold as scrap [R. p. 873]; I made no estimate of costs; hoped it would be low. I made a mental allowance for cost of clean-up, etc.; don't remember what was figured for cost of abandonment; am hazy about what Mr. Clements told me; left the matter to him on account of my inexperience. [R. pp. 875-878.]

We figured on everything on the property and expected to get everything with the exception of 'the items that were to be excluded.' [R. p. 881.] As we figured the largest portion of the material was

hidden tonnage. I realized the map would give us as much information as we could possibly get. [R. pp. 884, 885.]

The next conversation I had in connection with the transaction was with Davis. I brought him this cashier's check for \$22,000.00—present Mr. Davis, Mr. Clements and myself. We talked about those exceptions and then he called you and you were tied up. We made a later date that we should come up and sign the contract or go over it. He told us we bought everything on there, with the exceptions. Mr. Davis handed us a second sheet of sale. We didn't discuss items of equipment or anything. The memorandum was practically self-explanatory [R. p. 588]; there was nothing to mention. We bought everything and expected to get everything except the items that were excepted. There was no conversation because we understood our offer covered everything and his memorandum covered everything and the items that were to be excepted. We had already made the deal and had given them our money and there wasn't anything to discuss that I remember [R. p. 889]; there was nothing said other than that they wanted to maintain a water line for the superintendent's house and for the cattle that they were going to have on there and a gas line so that the superintendent would have gas; that we couldn't disturb the gas line [R. p. 891]; I don't remember whether that was in the conversation down there or whether it was up here at the time when we were discussing the things that were excepted. That was actually the whole gist of our conversation in all of these conferences, was things that we couldn't take. [R. p. 891.] I requested the addition of the words, 'all metal and lumber.' [R. p. 893.] You talked about having a gas line to the superintendent's house and you were

going to keep that house and you wanted a water line there; I think it is reasonable to assume that you wouldn't want us to go in there and tear up that gas line and wreck the man's mode of living. I didn't know that the gas came from the wells. [R. p. 894.] I didn't give any thought at all to this provision in the contract, which excludes gas pipe lines connecting wells with the superintendent's home as calling attention to the fact that the gas lines were connecting the wells on the property—where the gas came from never occurred to me. [R. p. 895.]

There was no mention of any wells. [R. p. 897.] I did not see gas seeping from the caps on the wells. I just said that I smelled gas. [R. p. 898.]

At no time did I make inquiry as to the abandonment of any wells; as to our right to abandon them, I didn't examine the map prior to the signing of the contract; I didn't make a minute examination of the map. In the conversation in your office we were discussing mainly the items that were to be excepted. [R. p. 900.] Those present were Mr. Davis, Mr. Clements, yourself and possibly McGahan. There was something in the contract or draft that you handed me that I didn't quite understand and I said, 'Well, as long as we are getting everything and we have bought everything with the exception of the items that you are excluding—' if you will remember, I said, 'I haven't any lawyer up here. If you will just put in there "all metal and all wood," that will cover everything except the items that you are excepting and I see nothing wrong with the contract.' [R. p. 901.] There was discussion about putting up fences and filling the ditches for all these cattle you were going to have there and also there was a discussion of certain lines that were to be cut off at the



tanks that you were to retain. [R. p. 903.] I don't remember whether at the conclusion of that conversation we were to have those metal supports and steel walkways and overhead lines. I would take it for granted that they would go because they were not excepted and everything that was on the property was to go. [R. p. 903.] It isn't true that I raised the point about the supports and the steel walkways and the overhead lines when I requested the addition of 'metal and lumber.' [R. p. 905.] My request for all metal and all lumber was to take in everything that was on that property. That was definitely my reason. [R. p. 906.] When I asked you to put the phrase 'all metal and lumber' in there, I had reference to everything, including the pipe, the pipe line in the wells and the pipe line and all the lumber and everything that was on the property. [R. p. 907.] No Richfield representative at that meeting mentioned the casing in the wells or the abandonment of any of the wells. [R. p. 908.] Mr. Clements did not tell me what quantity there was in pipe lines. He couldn't guess any more than anyone else because it was hidden. [R. p. 909.] We commenced work under the contract a week or ten days after the contract was signed. Our first steps to abandon any of the wells on the property was some time in June or the latter part of May, 1941. Clements handled that. I think that is when the question came up that you were objecting to the oil wells being taken up or something. [R. 911.] The reason we didn't begin before was that it rained. [R. p. 912.] By our offer we intended to buy everything on that property, including all the equipment, wells and everything, except the items that they had sold or were retaining; I did not intend to buy only such equipment as was on the surface of the land.

Prior to the time I made that offer, neither Mr. McGahan or any other official or employee of Richfield Oil Corporation told me that Richfield was interested in selling only producing and refining equipment and facilities which were on top of the surface of the land. And at the time I executed the contract in writing on January 17, 1941, my belief and intention was the same. [R. pp. 915, 916.] No one connected with Richfield ever told me that casing in the oil wells was not to be included in the sale.”

Mr. Ferer is shown what purports to be a carbon copy of a letter, dated December 10, 1940, addressed to Richfield Oil Corporation, and indicating that the letter was sent by Aaron Ferer & Sons:

“The Witness: It is a true and correct carbon copy of a letter written by Aaron Ferer & Sons to Richfield Oil Corporation. Mr. Krasne reads the first paragraph of the letter which was Plaintiff’s Exhibit No. 2.

At the time I wrote this letter I intended the word ‘pipe’ to include the pipe in the oil wells on the property as well as all other pipe on the premises. [R. p. 918.] The next thing that happened after I sent that letter was we received a call from Mr. Davis, a letter stating that they accepted our offer.” [R. p. 919.]

(Plaintiff’s Exhibits 1, 2 and 3 appearing in the record at this point are printed at pages 215 to 221 and are therefore omitted here.)

“At the time I received this letter, I had no knowledge of any intention on the part of Richfield Oil Corporation that Richfield Oil Corporation did not intend that the pipe in the oil wells was to be included in the same which they were accepting by this letter.

[R. p. 920.] I did not suspect that they did not intend by this document to accept a deal wherein the pipe in the oil wells was to be sold to me. At no time prior to the execution of the contract, dated January 17, 1941, did I have any knowledge of any such intentions on the part of Richfield Oil Corporation, or suspect that Richfield Oil Corporation had any such intentions. After receiving the letter from Richfield dated January 2, 1941, I delivered to Richfield Oil Corporation a cashier's check for \$22,000, on January 8th or thereabouts. I understood at that time as to what was intended by Richfield Oil Corporation when it used the words, 'Everything will be sold to the above with the exception of the following.' That it was just what it says, everything, and just what I figured on, all the pipe in the wells and everything on the property excepting the items that they retained or had sold elsewhere. [R. p. 923.] I never had any conversations with any official, employee or representative of Richfield Oil Corporation wherein anything to that effect that the pipe or casing in the oil wells was not to be included in the sale as stated by either of us, prior to the contract. There was not an oral agreement between me and Richfield, wherein it was agreed by the parties that only the producing and refinery equipment and facilities upon the surface of the land were to be embraced in the sale from Richfield to me." [R. p. 925.]

"About such matters as compliance with certain laws and the regulations of the fire warden and the Fish and Game Commission and the matter of the

term of the contract and the matter of how Aaron Ferer & Sons work was to be performed and the matter of insurance coverage and indemnification, etc. Those matters were not discussed but they were put in your contract. They were in the contract you drew up. [R. p. 930.] Pipe line to me means all pipe that is on the property and pipe in the wells. Pipe line to me would mean a string of pipe, whether it was vertical or horizontal or any other way. I am putting that meaning on it now and I have always had that." [R. p. 931.]

There is no vestige of evidence in the deposition testimony of either Clements or Zeidenfeld or Ferer to support the essential averment in defendant's counterclaim that on or about January 17, 1941, plaintiff and "defendant orally agreed" to the sale by defendant to plaintiff facilities and equipment upon the surface of certain premises, which agreement did not include casing or pipe installed in any of the oil wells, etc.

There is not the slightest evidence in the depositions of *any oral agreement whatsoever*.

It will be necessary for defendant's counsel to tell this court what, if any, evidence he claims, supplies such proof. Plaintiff's counsel, seeking to discover any testimony which might plausibly be so construed in order that the insufficiency thereof might be shown, has found none.

It is anticipated that the reply brief will attempt to bypass this issue on the theory that when the written con-

tract was executed, plaintiff suspected that defendant did not intend to sell the casings in the oil wells, and that defendant did not so intend. The findings indicate that this factual hypothesis, conjoined with Section 3399 of the Civil Code, satisfied the trial court of its right to render the judgment herein.

No finding was made that a prior oral agreement, differing from the written contract, was ever entered into.

There are three answers to this argument. 1. It is contrary to the settled law. 2. There is no substantial evidence in support of either of the facts which make up the theoretical premise, and, 3. If any such can be found, it utterly fails to meet the requirement of the law in cases for reformation on the ground of mutual mistake, namely, that the proof of defendant's intent and plaintiff's suspicion be "clear and convincing." Numbers 2 and 3 have been discussed.

**The Theory That a Written Contract May be Reformed by Court Decree Because of Party's Suspicions When no Prior Contract Had Been Made Has no Support in Law.**

Decisions have been quoted in this brief which show beyond the possibility of plausible contest that without allegation and proof of a prior agreement courts of equity have no power to reform a written contract, for the obvious reason that such action would constitute the drafting of a contract by the court merely based upon negotiations of the parties.

We challenge respondent counsel to produce any decision in California or elsewhere to the contrary. Our careful research has found none.

Section 3399 of the Civil Code does not so provide although it authorizes the reformation of a contract to conform to a prior agreement where it is shown that one party knew or suspected that in executing the contract the other party was making a mistake.

It is so held in the California cases which have considered Section 3399.

The latest of these cases is *Carpenter v. Froloff*, 30 Cal. App. (2d) 400. In upholding the pleadings it is said:

“The pleadings herein allege what the real agreement was, and what the agreement in writing was, and where the writing failed to embody the real agreement.” The opinion shows that the evidence supported these averments and also showed “how the mistake was made, whose mistake it was and what brought it about.” Other cases of the same type are *Los Angeles Co. v. New Liverpool Co.*, 150 Cal. 21; *Cleghorn v. Zumwalt*, 83 Cal. 155; *Bank of America v. Granger*, 115 Cal. App. 210; *Starr v. Davis*, 105 Cal. App. 632; *Burton v. Curtis*, 91 Cal. App. 11.

In each of the above cases (except *Auerbach v. Healy*), an agreement, oral or written had been made, and a subsequent contract or instrument to effectuate the original agreement contained some material alteration and the later instruments were reformed.

These decisions do not pretend to say that reformation could be decreed in the absence of an agreement whose stipulations could be given effect by reformation.

In *Auerbach v. Healy*, 174 Cal. 60, the Supreme Court states:

“In this state mutuality is not always necessary. It is sufficient if there was ‘a mistake of one party, which the other at the time knew or suspected.’ (Civ. Code, Sec. 3399.)

“Nevertheless the Court declared: The rules of pleading in actions for reformation of contracts are well established, and should be familiar. The complaint should allege (‘what the real agreement was, what the agreement as reduced to writing was, and where the writing fails to embody the real agreement.’ (34 Cyc. 972.))”

No substantial defense against the motion for summary judgment having been presented the denial of the motion was clearly prejudicial error.

Therefore, if authority is needed for so plain a proposition as that without proof of a prior agreement reformation of a contract will not be decreed to re-write a written agreement to make it conform to the suspected intent one of the parties to mere negotiations, we have it in the *Auerbach* and the *Carpenter* decisions, both of which have so held in spite of the fact that in each case Section 3399 of the Civil Code, and its “Knew or suspected” provision was taken into consideration and evaluated.

II.

**The Court Erred in Ordering the Dismissal of the First Cause of Action Set Forth in Plaintiff's Amended Complaint.**

The sufficiency of Count I to state grounds for declaratory relief was challenged by the motion to dismiss.

The order of dismissal was filed on January 12, 1942. [R. p. 41.] It shows on its face that it is predicated on the court's memorandum of conclusions, dated December 29, 1941.

The order reads:

“For the reasons set forth in the Memorandum of Conclusions this day filed, it is ordered that defendant's motion to dismiss the amended complaint be denied, also that defendant's motion to dismiss the first count of said amended complaint be sustained without leave to amend, and that defendant serve and file its answer to the second count of the amended complaint on or before January 12, 1942.”

Count I is the declaratory relief count. Thus by said order the parties were informed that the reason for dismissing Count I was within the language of the memorandum of opinion in which the court construed the written contract and held that by its terms the defendant sold and conveyed to plaintiff the casings in the oil wells which is the subject matter of this suit. It therefore is plain that Count I was dismissed because the court concluded that no substantial controversy between the parties existed which necessarily construes the memorandum opinion as having decided the written agreement was so plain and unambiguous that the meaning of its term were not open to dispute. Appellant will contend that this is



not sufficient ground to dismiss an action for declaratory relief, yet no other possible reason appears in the memorandum.

Count I contained all of the elements of a proper case for declaratory relief under the present Federal Rules of Procedure which provide for the determination of questions both of law and equity where there is an "actual controversy."

It is clear that Judge Holzer misconstrued the law, section 400, Title 28, U. S. C. (Jud. Code Sec. 274d).

It is implicit in his decision that he thought that the term "actual controversy" as it is employed therein means "substantial controversy," that is, a controversy based on substantial grounds.

Said Section reads:

"Declaratory judgments authorize procedure. 1. In cases of actual controversy the courts of the United States shall have power upon petition, . . . to declare the rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief be prayed and such declaration shall have the force and effect of a final judgment or decree and be receivable as such."

Ohlinger says with reference to whether an "actual controversy" is presented in a given case, three test questions are presented:

They are:

1. Whether the parties intend or desire to act on the rights to be declared;
2. Whether "present" or "future" rights are involved;
3. Whether the parties are friendly.

An affirmative answer to the first test is requisite. Negative replies must be provided to the second and third. [Vol. 3, Ohlinger's Fed. Pr. p. 751, *et seq.*] With reference to the meaning of the term "actual controversy," the Ohlinger text relies upon decisions which hold that the matter must not be moot and a legal question must be presented whether formed upon matters of facts or of law. There can be no doubt that the instant Count I qualifies as to this definition. It shows that the parties made conflicting claims to the oil casings in certain oil wells, based on a written contract. It is not material that the answer to the question thus presented is obvious. It is said in *Maryland Cas. Co. v. Hubbard*, 22 F. Supp. 697, 702, "The existence of a cause of action is not essential to a declaration. It may seek only adjudication of freedom from a claim (citing cases) and it is said the purpose of declaratory relief is to "set controversies at rest," (citing Federal cases and other authorities).

Hence, it necessarily follows that the interpretation which Judge Holzer had given to the written contract was no valid reason for dismissing Count I, because the averments set forth therein showed that, however ill founded, the defendant claimed that the oil casings were not included in the sale and conveyance which the written contract, on its face, included. [Amended complaint paragraph VI, VII, VIII, R. pp. 21-23.]

Test 2. Paragraphs IX and X [R. pp. 23, 24] show that the controversy is so definitely *in presenti* that the de-

fendant is interfering with the carrying out of the contract by the plaintiff.

Test 3. The whole count negatives the idea that the suit is friendly. This fact is too clear to require elaboration.

It may be properly added that the finding in the "Memorandum of Conclusions" pertaining to damages claimed by the plaintiff could not warrant the conclusion that plaintiff is not entitled to declaratory or equitable relief.

As to plaintiff's claim for damages—the Maryland Casualty Company case and others cited in its opinion hold that the present Federal Rule 57 includes legal rights, legal relations and legal remedies. To the same effect see Volume 3, Ohlinger's Federal Practice, page 776. Also on pages 779 Ohlinger points out that by Rule 57 "The right to trial by jury is saved." It is too plain to require authority that a defendant cannot defeat the plaintiff's right to relief by a counterclaim seeking damages.

Since Count I states facts which entitle plaintiff to maintain its suit for declaratory relief Judge Holzer's order dismissing it was error.

*Actna Life Ins. Co., v. Haworth*, 300 U. S. 277,  
81 L. Ed. 617;

*United States Fidelity etc. Co., v. Pierson*, 97 F.  
(2d) 560.

III.

**All of the Essential Findings of Fact Are Contrary to the Evidence. They Are Unsupported by Any Substantial Evidence.**

Before proceeding with a detailed discussion of the findings it is important to recall that in denying defendant's motion to dismiss Judge Holzer had determined that the written contract is clear and unambiguous in its language and that by its terms it conveys to plaintiff the casings in all of the oil wells involved in this suit. These findings have not been seriously questioned and the attempt to reform the contract presupposes the soundness of Judge Holzer's original decision. The findings themselves are drawn on that theory, although by Finding 30 the judge expressly refrained from again committing himself on that issue. [R. p. 154.] But for the purposes of the questions now being argued the import of the written contract has been clarified and stands out as the target to be torn down by such extrinsic evidence as defendant was able to produce.

The presentation of this ground for reversal and assignment of error will follow the pattern of the findings in respect to their substance and effect; that is to say, the findings group themselves into two principal classes.

In group 1 are findings of ultimate facts.

Group 2 are findings upon evidentiary facts from which it is apparent that the court based its findings of ultimate facts.

Appellant proposed to prove from the record that each of the evidentiary findings is either unsubstantial as evi-

dence of any ultimate fact found, or is unsupported by any evidence. It is obvious that such proof must invalidate the findings of the ultimate facts and render them insufficient to sustain the conclusions of law or the judgment.

#### THE FINDINGS BY GROUPS.

Group 1. In this group are a part of finding 3 and findings 4 and 5. They purport to find that the written agreement does not express the intention of the parties at the time said agreement was executed, and that the parties intended to exclude casings in oil wells from the sale, which exclusion is not contained in said agreement.

A part of findings 8 and 23 are to the same effect as to defendant's intentions *during the period of negotiations*.

By finding No. 10 the court concludes that plaintiff knew or suspected that defendant did not so intend when the contract was executed. Finding 24 is to the same effect as No. 10, as to the plaintiff's knowledge and suspicion *during the negotiations*. By finding 28 the court concludes that the failure of the written contract to express the true intentions of the parties was due to a *mutual mistake*.

By finding No. 25 the court finds that it was *defendant's mistake* which caused the failure of the written contract to represent the true intentions of the parties. By finding 29 two particular items are named as being the provisions of the written contract which fail to express the intention of the parties, the primary one being the provision which includes within the sale casings in the oil wells.

It is important and noteworthy that by none of these findings did the court find that the parties ever entered

into an oral contract prior to the execution of the written contract.

All other findings (except 1, 2, 6 and the last paragraph of 7 and 31, which are not challenged) are evidentiary findings in support of said findings of ultimate facts. These are numbers 7 (except the last paragraph), a part of 8, and numbers 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22.

EACH OF THE EVIDENTIARY FINDINGS IS EITHER UNSUBSTANTIAL AND INSUFFICIENT TO SUPPORT ANY ULTIMATE FACT OR HAS NO SUPPORT IN THE RECORD.

A part of finding 8, and finding 9, each consists of statements of fact found by the court which were apparently regarded by it as tending to show that the defendant did not intend to include in the sale any of the casings in the oil well. These facts will be discussed in the order which they occupy in the said findings. They read:

1. "During said negotiations and at the time of the execution of said contract, all of said employees of defendant knew that none of the oil wells upon defendant's Casmalia property was to be abandoned. Such employees had been instructed that 'surface equipment' on said premises was to be sold. Neither defendant nor any of said employees intended to sell to plaintiff any of the oil well casing in any of the wells. Neither defendant nor any of said employees of defendant intended that any of the oil wells be abandoned or that any casing be removed from any of such wells. Casing cannot safely be removed from an oil well without complying with the requirements of the California Division of Oil and Gas regulating the abandonment of oil wells."

There is some testimony in support of this finding. It all came from the defendant's employees. The ease with which such evidence can be produced and the obvious impossibility of contradicting it, necessarily renders such evidence standing alone, considerably less than the clear and convincing evidence required to invalidate a written contract or any provision thereof.

In this case it cannot be denied that another consideration reduces the alleged statements of these employees, said to have been made, as they were, within the privacy of their employer's office and among themselves, to a minimum of weakness. These very witnesses were aware that they had grossly neglected their several duties to protect the interests of Richfield by reason of total failure to object to the provisions of the written contract, which provisions, according to their testimony, they had been instructed to exclude. This feature of the evidence will be elucidated later in this discussion, but the brief statement above made suffices to show that no reasonable person could accept their testimony alone, as convincing evidence of the circumstances above set forth, which, even if true, supplies no rational basis for any inference.

As to the intentions of the Richfield Corporation management, undoubtedly situations similar to the one here presented gave birth to the adage, "actions speak louder than words." If it is true that during the period of negotiations said employees of the defendant all knew that the oil wells were not to be abandoned and that defendant intended to sell its surface equipment and that casings could not safely be removed without abandoning the wells according to law, and if from these facts said employees suspected that the casings were to be excluded from the sale, how could said employees have failed to note that the

written agreement, as drafted by Richfield's able attorney failed to exclude the oil well casings after providing that all of the "equipment and facilities located on said land" including, among other things, all "metal" located on said land, was sold to plaintiff; also that defendant thereby required Ferer & Sons to remove "all equipment, facilities and other property located on said land," without excepting any casings in any wells on said land? [R. p. 27.] They all read this instrument and no one mentioned the casings or requested that a provision for their exclusion be added to the writing. This happened in the office of Mr. Paradise on January 17, 1941. [Rep. p. 308.] Mr. McGahan was there; Davis was there; Kelly was present and Mr. Paradise was there. [R. p. 308.] Of course, if any of defendant's employees, Davis, McGahan, Kelly or Montgomery, or Richfield "management" had ever informed Mr. Paradise that the oil wells were not to be abandoned and that no casing in any oil well was to be sold he would have most certainly not failed to protect his client's rights. To reason otherwise would be preposterous. Hence none of these employees or "management" ever said anything to Mr. Paradise concerning these alleged intentions. But before the above illuminating event occurred, at which experienced and efficient employees all coincidentally suffered a total lapse of memory or were stricken blind or dumb, Ferer & Sons had made a formal written offer of \$22,000.00 couched in equally all-inclusive language [Plaintiff's Exhibit 2, R. p. 215], and said employees, Davis and Kelly, had read the same, it must be presumed, carefully, and then with equal care had prepared and signed an acceptance thereof, specifying and expressly stating Richfield's understanding that the offer provided that defendant sold to plaintiff "*all tanks . . . tank car loading facilities and other material and equip-*



ment belonging to Richfield located on our Soladino lease in Casmalia with the following exceptions," in which no mention of oil casings was inserted. [Plaintiff's Exhibit 3, R. p. 218.]

Truly, the person, whether layman or judge, who would believe that either Davis or Kelly then had knowledge that defendant did not intend to include any oil casings in this deal or that they, individually, intended that such casings should be excluded, would believe in Santa Claus and accept as absolute verity all of the stories related in Alice in Wonderland. The entire conduct of these men in reference to either one of these written documents, definitely and conclusively belies their testimony. It was none other than Davis, whose business it was to conduct the preliminary negotiations of such sales as this one, who prepared Plaintiff's Exhibit 1, dated January 8th, 1941. [R. p. 219.] It purports to be a memorandum of this transaction, which says that "everything will be sold to the above with the exception . . .," followed by a list of exclusions, which list *does not contain any reference to oil wells or casings in oil wells*. At this point in the negotiations a statement by Davis was a statement by Richfield. He was authorized to conduct the preliminary negotiations of these sales. [R. p. 93.] It is unbelievable that this particular employee had ever held the thought that the casings in the oil well were being reserved from this sale or that he ever had been informed by a superior in the Richfield set-up that such was the purpose or intention of "management."

However, Judge Holzer had the exhibits read to him. He presumably perused them during the period while he had the case under advisement. Yet he brushed them aside as of so little consequence that they did not even

raise a substantial or reasonable doubt in his mind as to the truth of the testimony of the deeply interested witnesses who declared that they and Richfield "management" did not intend to sell the casings in the oil wells, and he fully credited their stories, which collectively declared that Montgomery told Davis or Kelly, Kelly told Davis and Davis told McGahan, and all of the Richfield employees knew, that the casings in the oil wells were to be retained for use when the wells should be reopened. Self-serving as the testimony of these employees was; flatly contradicted as it was by every writing to which any one of them affixed his signature; condemned as utterly unbelievable as that testimony had been by the conduct of each employee who partook in or knew about and had the opportunity to protest against the failure to exclude the casings from this sale, the trial judge still found that "Neither the defendant nor any of said employees intended to sell to plaintiff any of the oil well casings in any of said wells," and that "such employees had been instructed that 'surface equipment' on said premises was to be sold."

To say that this finding is based upon the "clear and convincing evidence," which the law requires to warrant reformation of a written instrument, deliberately executed, is not merely unreasonable, it is irrational.

No single circumstance pertaining to this issue is more important as tell-tale proof than the fact that Attorney Paradise *failed to testify* that Davis or Kelly or Montgomery or "management" informed him when he received the date for drafting the written agreement, that the casings in the oil wells must be carefully excluded from the sale. It must be remembered that said casings was the *only item* which Richfield witnesses pointed out as having been mistakenly omitted from the exclusions of the writ-

ten agreement; everything else was meticulously taken care of in the draft which Mr. Paradise prepared; yet the casings represent the one and only important item to Richfield, from the standpoint of value and of utility. A few feet of gas pipe could be replaced at trifling expense; a water pipe, the same; a superintendent's house need not be a mansion; the six storage tanks could be replaced at comparatively small expense. However, the silence of Mr. Paradise as well as the failure of every employee witness concerned to testify that he told the attorney about the alleged fixed policy and purpose of "management" and of said witnesses to keep the casings, and demonstrates that Mr. Paradise never had received the slightest mention of the matter. This being a fact, it logically must be concluded that the testimony on which said finding was based is false and unbelievable because if it had been true the exclusion of the casings would have been uppermost in the minds of Davis, Kelly and Montgomery and they would have not failed to tell Paradise about it.

We invite opposing counsel to show fallacy in this reasoning.

With reference to the finding that all of the defendant's employees knew that none of the wells on the Casmalia property was to be abandoned and that the casings cannot safely be abandoned without complying with regulations of the California Division of Oil and Gas, said facts, even if true and supported by evidence, have no tendency to prove that defendant did not intend, by this transaction, to sell said casing. This proposition has been fully discussed under the preceding caption and need not be repeated here. However, it should be added, that since the written contract conveyed the casings it must be inferred that *defendant intended to comply with the said regula-*

tions, if any action by Richfield was necessary. A contract to sell implies a covenant to deliver. Failure to deliver is a breach of contract.

Surely the facts last mentioned argue against the court's theory and findings and strongly indicate the opposite intent.

On the other hand, how can it be logically inferred that the knowledge by Davis and Kelly and Montgomery, and even McGahan (who had no authority to make a sale), tends to show any intent on the part of the defendant, since all of that brain-burdening knowledge had so little significance to them, and to each of them, that they not only stood by without a verbal utterance of protest, but participated in the preparation of Plaintiff's Exhibit 2 [R. p. 215], and in the acceptance of Plaintiff's Exhibit 3. [R. p. 218.] By these documents the sale of the casings was recognized or made an accomplished fact, even though, defendant claims, this necessarily required the abandonment of the wells. It simply does not make sense to accord to the circumstances set forth in said finding any weight as a factor in making out a clear and convincing case for the reformation of a contract. There is no other evidence which could plausibly be classed as tending to show that the defendant's employees intended anything other than the intent shown by the written contract.

The finding, itself, is meaningless and immaterial to any issue in this case in stating that said employees "had been instructed" that none of the oil wells "were" to be abandoned. Instructed by whom? The finding fails to say by whom. This is vital because we are dealing with the intent of a corporation which can intend only through authorized officers. Instructions from any other officer or employee would thus be irrelevant and every presump-

tion is against any inference which would change the written contract. Again, the testimony of Montgomery shows that neither he, nor Davis, nor Kelly had authority to determine what equipment should be sold. He continually told of making recommendations to "management" and referred to "the management" deciding such matters [R. pp. 468, 470, 471, 473], and nowhere in the testimony of any witness can be found any information as to what person or group of persons constituted "the management." The intentions of these inferior officers are not the intentions of Richfield. The record contains no competent evidence to show that the Richfield Corporation had any intent except as shown by the written agreement, and nothing in finding 8 tends to show a different intent on the part of Richfield. When asked by Mr. Sturzenacker if he called "anybody's attention to the fact that in his mind Richfield was selling the surface producing equipment and not selling all of the producing equipment on the property, Mr. Montgomery said that he could not say to whom he gave any instructions as to what was to be sold, and he said:

"I had laid down to the man that negotiated the contract or negotiated the sale of this stuff the type of equipment in so far as the production department was concerned and *in so far as I was authorized from my management* as to the type of equipment that was to be sold." (Emphasis added.) [R. p. 480.]

The nearest that Mr. Montgomery ever came to indentifying management was to say that he attended meetings of the "executive committee" [R. p. 467], and made recommendations at "these so-called executive meetings." [R. p. 471.] However, neither by his testimony nor by that of any other witness did the defendant show that

this "so-called executive" group as Montgomery terms it, which may or may not have been "management," ever took any action or officially formed or expressed any intent whatsoever.

Where, then, is there any evidence to the effect that *the defendant* intended to retain the casings in its oil wells? Appellant insists that none exists in the record.

Finding 9. The facts set forth in this finding, on their face, reveal that after operating the wells for about eight years their owner shut off production from them. Fifteen years passed by and the wells were allowed to still remain dormant up to January 7th, 1941, when the written contract was executed. All during these long years, from "time to time" the "problem" of reopening them was "studied"—and that is all. Without more, the conclusion cannot be escaped that the problem left Richfield in doubt; otherwise, why the delay? The field had been drilled; oil had been produced; the fact that production was stopped shows that the wells were not profitable; what was there to study? The mere fact that when derricks, tubing and rods were removed, the casing was not sold, as the court finds, does not show or tend to show that the reason for not selling it was an intention to reopen the field. We need not go beyond matters of common knowledge in California to know that casing in abandoned wells is often removed and used in other fields when needed, and in the meantime is allowed to remain where it is; it might well be that the time to sell second-hand casing was not opportune. The demand may have been slight and prices low. Every presumption in equity is against the view that any circumstance tends to sustain an attack upon a written contract deliberately executed. (*Manning v. Sourissen*, 128 Cal. App. 635; *Moore v. Vandermast*, 19 Cal. (2d) 94.) The interpretation of any fact or circumstance

which favors the correctness of such a contract must be adopted rather than one which would impair it. (*Burt v. Los Angeles etc. Assn.*, 175 Cal. 668; *Moore v. Vander-mast* and *Manning v. Sourissen*, both *supra*.) The finding that "defendant was of the opinion and belief that such derricks . . . would not be suitable or desirable for use . . . at such time as defendant reopened the field," etc., is meaningless in the absence of any finding that the defendant *intended to reopen the field*, and the fact that the court *refrained from making this finding compels the inference that there was no evidence upon which such a finding could rest*, and it coincides with the logical inference to be drawn from the other facts above discussed, which is that no such intention ever existed, and that, as a matter of fact nothing more definite had occurred than that someone, probably Montgomery, had toyed with the idea over a period of years of opening the field; also, the language of the finding is evasive as to the "new method" which is mentioned, *but whose existence is not found*.

The only act of the defendant which the court was willing to find had ever been done throughout more than fifteen years is described in the last sentence of finding 9. It is said "sometime in 1940" defendant performed an "operation by running instruments into the wells" and "learned that the casing was sufficient to hold back the formations penetrated by the wells"; in other words, the casings operated upon were not yet so corroded as to be unfit for present service if kept in place. Apparently it was suspected that the operation might reveal bad news to the contrary. However, since the presumption must be against any interpretation favorable to the de-

defendant, this finding cannot be otherwise than that the operation was not performed until the last day of 1940, at which time the negotiations in the instant transaction were about concluded, and could have no effect upon the intentions of defendant's employees, Davis and Kelly, unless they were informed of the results of the operation promptly, *and the court did not so find*. On the whole it seems not too much to say that as against the strong presumption that the defendant intended to convey the casing as the written contract provides, and if necessary to its delivery, to abandon the wells, as expressly required by the written agreement, the facts set forth in finding 9, collectively, are too puny and insufficient to tend to show a contrary intention.

The foregoing evidentiary findings concern the intentions of the defendant, only. In that behalf reference is made to a caption wherein it was pointed out that Kelly's affidavit shows that "management" and not Kelly, determined what property should be sold, and that it was not shown what officer or employee or group of employees constituted "the management" or that "management" ever gave any instructions to Davis, Kelly or Montgomery to exclude casings from the sale, or officially formed or had an intent to that effect. Therefore, there is no competent testimony in the record concerning defendant's intentions other than the written contract and as shown by other exhibits, to-wit: the Davis "memorandum of sale," plaintiff's offer and defendant's acceptance.



FINDINGS WHICH CONCERN PLAINTIFF'S INTENTION  
AND ALLEGED SUSPICION

Under Caption I appellant has discussed the facts found in findings 11, 12, 13, 14, 16, 17 and 21 as they relate to the court's order denying plaintiff's motion for summary judgment. The affidavits and depositions of the witnesses for both sides were reviewed and analyzed and it was shown that according to the affidavit of Mr. Davis, McGahan had no authority to conduct any negotiations for this sale and that Davis had exclusive jurisdiction of negotiating the sale. It was pointed out that therefore, neither Ferer, nor Clements was charged with the notice of anything which McGahan may have said. Also, it was shown that the testimony of Clements and Ferer to the effect that their intent was as expressed in the executed contract, and, that said affidavits and depositions contain no substantial evidence tending in any way to belie their testimony but does reveal much in consonance therewith. In so far as the facts set forth in the above group of findings is concerned the testimony of the same deponents which was given by them at the trial adds nothing to the materiality of said facts and sheds no new light upon them to give them greater or different meaning. Therefore, in the interest of brevity, which appellant is compelled to regard, further elucidation of said facts will be omitted.

We proceed to the other findings of evidentiary facts. Finding 15 reads:

"The expression 'surface equipment' is a term in common use in the oil industry, which term means equipment located upon the surface of the land and includes pipe lines even though a portion thereof ex-

tends underground. Casing in an oil well is not classified or referred to in the oil industry as 'surface equipment' but is commonly referred to as 'subsurface equipment'."

Finding 15 is not clearly and convincingly supported by the evidence. Its only support is hazy, inconclusive, and indefinite. Two experts testified. Mr. Clements, who, according to finding 18 was qualified as an expert on this question was not asked to express an opinion as to whether the term "casing" is referred to in the oil industry as "surface equipment" or as sub-surface equipment. However, he said that "casing" is considered in the oil fraternity in this locality as a part of production equipment." [R. p. 559.] The defendant's expert, Montgomery, conceded that "surface equipment" and "production equipment" are "rather related" [R. p. 494]; he said "some people would consider it (casing) producing equipment and some would call it subsurface equipment", and that "it is certainly used in the production of the well", etc. [R. p. 492.] Thus it is clear that in classifying equipment in the oil industry casing may be called production equipment and that the term "surface equipment" is so interrelated with "production equipment" that casing may be included in surface equipment. Hence, expert Montgomery's statements preclude the presumption that Messrs. Ferer and Clements were given reason to suspect that casings were to be excluded, based on the testimony of defendant's employees who said that they told these men that the "surface equipment was to be sold", because, the contract and the offer and acceptance and the memorandum of the sale all represented that *all of the production equipment*, except the specified items

was being sold, and Montgomery said "some people would consider casing as producing equipment" and "*It certainly is used in production.*"

On the other hand, in view of the plain language of every written instrument which figures in the transaction, all but one of which was drafted by defendant's attorney or other employees, plaintiff had a right to believe that defendant intended to convey the casings, whether they are sub-surface or surface equipment for these instruments purported to sell *all of the* production equipment and *facilities* as well as the surface equipment.

For some reason defense counsel failed to ask his expert to define the term "facilities" as used in the oil industry. Obviously it means something more than "equipment". The context demonstrates that the word "facilities" was employed in this contract to include property used in production other than "equipment." The word "facility" is defined by Webster's New International Dictionary as "a thing which promotes the ease of any action, operation, transaction or course of conduct." Certainly casing in an oil well "promotes the ease of the operation" of producing oil. It promotes the ease of the action, the transaction and the conduct of the production. Indeed, it would be difficult to name any other "thing" which is "used in production" of oil except the casing, which promotes the operation of producing oil as distinguished from production equipment. At any rate, no doubt can be entertained that "all facilities" as here used includes and connotes "casings", which, by any quibbling or technical sophistry, could be excluded from the concept of the word "production equipment." Hence the meaning of the "production equipment" is a moot question in this

case and one which could have given plaintiff no concern or cause for consideration. In any event, the evidence does not support finding 15.

Finding 18 [R. p. 153] provides a fact which is included within the rational applicable to the facts discussed under the preceding caption. The finding refers to Mr. Clements' visit to Casmalia when work was being done under the Anderson contract. Mr. Clements had no reason to consider why or how the defendant caused the Anderson contract to be executed or to be concerned in finding out whether defendant had abandoned the wells at that time or whether the field had been depleted of oil. Mr. Clement's only concern was that the defendant had represented in writing that it had certain property for sale. These matters have been elucidated under the previous caption.

In Number 22 the Court finds that if the parties had intended to include the well casings it would have been obligatory on plaintiff to dismantle and dispose of all of the equipment and facilities and to remove the casing "and for that purpose to abandon all of such wells", and that plaintiff did not understand that it was so required and "never intended to abandon such wells". This is a tricky, deceptive finding. It reads:

"If the parties to said contract had intended to include the casing in such wells among the equipment and facilities to be sold thereunder, it would have been obligatory on the part of the plaintiff, in connection with its obligation of 'the dismantling, removal and disposition of all equipment and facilities to be purchased' under such contract, to remove the casing from all such wells and for that purpose to abandon all of such wells. The plaintiff never in-

tended to abandon such wells and did not understand or consider that the provisions of said contract required plaintiff to perform such work or dealt with that subject matter.” [R. p. 153.]

In one respect finding 22 is in the same class with a similar finding contained in Number 9, which has been discussed. Suppose it is true that if the casing was included in the sale, the wells would necessarily have had to be abandoned—this fact is not inconsistent with the intent of either and both parties to include casings in the sale. Since the contract presupposes abandonment it also implies that the *seller*, if called upon, will take whatever steps are necessary to accomplish such abandonment. To reason otherwise is to assume a non-existent premise and use it as the basis to create an arbitrary and illogical presumption contrary to and *against the written contract* which the court cannot do legally.

The finding in the last sentence of Number 22 is clearly a conclusion drawn from the preceding absurdity. However, this *is a tricky finding*. Its first factual premise is a portion of the written contract which the defendant seeks to reform, to-wit: the provisions for the dismantling, disposition and removal of the property to be sold and purchased. The second factual premise is that plaintiff misunderstood this provision of the contract and did not intend to abandon such wells. As to this second factual premise the court found too much and wiped out whatever possibility it otherwise might have possessed of being the basis for a rational inference to the effect that plaintiff did not intend to buy the casings. This finding

itself provides a reason for the intent ascribed to it which cannot be reconciled with the idea that plaintiff did not believe it was buying the casings.

The finding states: plaintiff “. . . did not understand or consider that the provisions of the contract required plaintiff to perform said work”, etc., the work being the dismantling, disposal and removal of the casings. *The court did not say that plaintiff did not intend to remove the casing.* This finding necessarily implies that plaintiff did intend to remove the casings, *but not for the purpose of abandoning all of such wells*, and that plaintiff's said intent was based upon a misunderstanding of the meaning of said provision of the contract with respect to the necessity of abandoning the wells when and as it would remove the casings. If a mere misinterpretation of the contract in respect to one obligation or right could be taken to indicate an intention to disregard another obligation or to waive another right, from defendant's alleged misunderstanding and misinterpretation of the instant contract, which the court expressly finds, it must be inferred that defendant intended to waive its right to exclude the superintendent's house or the gas lines leading to said home.

Finding 22 is also fundamentally erroneous because, *as a matter of law, it is contrary to the evidence.* In stating that under the provisions of the written contract it would have been the duty of the *plaintiff* “to abandon all of such wells” the court holds contrary to the universally settled law. By the first provision of the contract which the court ordered changed defendant sold the casings in all of the wells to plaintiff. As a matter of law this entailed the duty of abandoning the wells upon the owner of

the property—the defendant. It is elementary that one who sells an article contracts to deliver it. (46 *Am. Jur.* p. 376.) Under the applicable law of California and the Rules of the Bureau of Mines the owner of an oil well is the party who must make application for permission to abandon it. It is equally settled law that when any act of a party to a contract is essential to carry out its terms, an agreement for the performance of that act will be implied and deemed within the provision to do the act. (12 *Am. Jur.* p. 766.)

There can be no doubt that in assuming, as finding 22 does, that the intent of the parties with respect to excluding well casings from the sale may be inferred from their intentions as to abandonment of the wells, all predicated on the erroneous premise that it was plaintiff's obligation to abandon the wells, the trial judge again overreached himself, and found too much. This conclusion is logically inescapable, because since the law and the contract requires the *defendant* to abandon the wells, and the uncontradicted testimony of Ferer and Clements shows that they intended to do everything in that behalf which the law and the State Administrative officers might require, the inference is in plaintiff's favor and tends to show that it, at all times, intended that the casings should be included in the sale. Upon the same premise, the same inference must be drawn as to the defendant's intentions, for it also must have known that the law required it, as the owner of the wells, to do its part in bringing about the abandonment of the wells in order to deliver what they were selling.

Otherwise, stated, the court's error as to the law, reverses the direction in which the inference points, so that

it tends to keep the written contract intact rather than to alter it.

As above interpreted finding 22 is supported by the testimony of Mr. Clements. He was definite in testifying that he understood and intended that the well casing should be a part of the sale. However, he maintained that it was not impossible to remove casings from the wells without abandoning them. This immaterial testimony is the sole peg on which this finding as to plaintiff's intent and understanding is hung and which led the court into making said finding which back-fires against the defendant as above shown.

On the other hand the literal statement that the "plaintiff never intended to abandon" such wells and considered that the provisions of said contract did not require it to dismantle, remove and dispose of them is wholly without support in the evidence. The only evidence pertaining to that question is found in the testimony of Mr. Clements and Mr. Ferer. Mr. Clements said that while he and Mr. Ferer were at Casmalia inspecting the property, he said, in his own mind, that he did not see any obligation to abandon any of the wells [R. p. 806]; that it was his intention to abandon only those which it would be profitable to abandon. [R. p. 801.] This was before actual negotiations had begun. The deal was still in the embryo stage. Even at that time, however, Clements showed his full intention by testifying "We were going to live up to all of the obligations both to the State government and all liabilities attendant on the abandonment of that property and so stipulated and so signed it and executed it in that contract." Hence, regardless of his thoughts to himself in the beginning when the contract



was made, Clements intended just what its language expressed. Ferer's testimony discloses that he did not consider the matters at all at first but when asked his intentions concerning the abandonment of the wells as provided in the written contract the records show that when asked by Mr. Paradise what his intentions were as to abandonment of the wells, he answered:

“Well, we consider ourselves a pretty reliable company, and, if there was any bitter with the sweet, we would have to take it and, if there was anything we had to do, that is what we would have done because that is the way we do business.”

Finding 22 is imaginative and irrational and contrary to the evidence.

#### NO 29—AN ARBITRARY, UNWARRANTED FINDING.

Finding 29 is definitely contrary to a mass of evidence, the principal part of which was supplied by the defendant's own employees. The Court found that “the mistake . . . was not caused by or the result of negligence on the part of the defendant.” Negligence more gross has seldom ever been revealed in any case than that proved by the defendant against itself in this case. According to the defendant's witnesses, and as found in these very court findings, defendant's employees were all informed and knew throughout this transaction, that the defendant did not intend to sell the oil well casings. That one thing they all claimed to have known. Those who negotiated the deal and who read plaintiff's written offer and executed the acceptance thereof and who joined in executing the written contract in its final form, all had this knowledge and they also claimed to have known that

Richfield intended to exclude a list of comparatively minor items from the sale. It was McGahan's duty to receive bids; Davis' duty to conduct preliminary negotiations; Kelly's duty to execute the contract. Montgomery gave Davis instructions as to certain items to be excluded.

Richfield's own attorney, Mr. Paradise received information from Davis, as to what the terms of the sale were to be and was asked by Davis to draft the contract.

Mr. Paradise drafted the contract. Prior thereto Davis had drafted and signed a memorandum purporting to show what property Richfield offered to sell, and the items which were not for sale, among which items casings were not mentioned. He received an offer in writing enclosing a \$22,000.00 check from plaintiff which specified the property to be purchased, and the excluded items, all of which was in agreement with the memorandum. Thereafter Davis, prepared a written acceptance of the said offer, again enumerating the same excluded items, without naming casings in the oil wells. Therafter, Kelly signed and executed the final draft of the contract as prepared by defendant's attorney in which the property to be sold was described in general, all-inclusive terms which included all of defendant's *production equipment and facilities* on the oil field in question. It enumerated the same list of excluded items which had been named in the preceding writings and additional reservations, but did not exclude the casings. During the trial defendant's attorney stipulated that none of said written instruments contained any provision excluding from the sale the casings in any oil well. [R. p. ....] The court found that the mistake which had been made, by reason of which the written contract should be reformed, consisted "of the

failure of said contract to expressly provide (1) that the subject matter of the sale did not include the casings in any of the oil wells located on said land.” [R. p. 154.]. Without more negligence, more flagrant and inexcusable than is shown in any reported case that has ever been found by appellant’s counsel is revealed.

We challenge opposing counsel to produce an example of greater negligence in any business transaction. If Mr. Paradise was informed by Davis and or Montgomery that the casings were not to be sold it was gross negligence on his part to have failed to place the express provision in the contract which the court finds was omitted by defendant’s “mistake.” If Paradise was not so informed, by either Davis or Montgomery, they, and each of them, were guilty of gross negligence. Also, Davis and Kelly were negligent, in the highest degree, in leaving that same provision out of the acceptance of plaintiff’s offer, and Davis was equally negligent in omitting it from the memorandum upon which plaintiff based its offer. The effect of Judge Holzer’s finding is a stain upon the record of courts of equity. It places the court’s stamp of approval upon conduct which any prosecutor would convincingly argue proved deliberate fraud, since the principal thing of value in the deal was withheld, after the seller had received \$22,000.00 for the property which its employees had repeatedly led the purchaser to believe it would get. What chance would a defendant have in such a prosecution to relieve himself of the fraud by having employees take the stand and swear that they told the purchaser that the property to be sold was “surface equipment?” A jury would be told that it is a common practice among slickers to siily prepare a defense of alleged oral con-

versations to meet any charge of fraud and that the employees were accomplices in the fraud. Many a man has been convicted of theft by trick and devise or false pretenses on less evidence than is here shown. But "the half has not been told." Defendant's employees must have known that both Clements and Ferer were dealers in junk. They had no reason to believe that either of them were conversant with terms peculiar to the oil industry. Although Clements stated that he had some familiarity with such terms, no evidence shows that Davis or Kelly or Montgomery or even McGahan knew this to be a fact. If by saying to Ferer or Clements that the "surface equipment and facilities" would be sold, defendant's employees meant to convey the information that the casings were not for sale, why did they not say just that, plainly and directly? Had one employee, on a single occasion, used this cover-up expression it might be regarded as a mere inadvertence, but where, as here, each of several employees claims to have used the same term in talking with Ferer or Clements at least once, and none of them ever claimed to have said "The casings are not included", or "the subsurface equipment and facilities are reserved" the strange coincidence permits the inference that it was a part of a scheme and plan to deceive, *because defendant's witnesses asserted that they knew the precise meaning of these terms.* Again this same assortment of employees who each failed consistently, to mention casings in oil wells to Ferer or Clements, as though to do so was taboo by common understanding, sat in a meeting in attorney Paradise's office with Messrs. Ferer and Clements (without counsel), when copies of the attorney's draft of the contract were distributed to everyone present and were read by all. This draft contained

no mention of "surface equipment" or of casing in the oil wells, but did convey everything on the property, except, the items which had been excluded in the previous writings. Not one Richfield employee called attention to the supposed fact that his employer intended to exclude the casings from the sale; no one said "we are only selling the surface equipment and facilities." Davis, Kelly and McGahan read, but sat in silence. *Assuming that these men knew* that the sale was intended by their employer to be of surface equipment only with casings excluded, surely they were grossly negligent in failing to protect its interest.

On the other hand, if said employees knew that Richfield did not intend to permit plaintiff to remove the casing was not their conduct fraudulent as to Ferer & Sons, and Clements?

Appellant contends that finding 29 has no support in the evidence and is flatly contrary to the undisputed evidence; that the courts' absolution of the defendant of all taint of negligence is a gross miscarriage of justice, and likewise a judicial admission of ignorance of the principle of estoppel.

Finding 30 is a maverick. It does not belong to either group 1 or group 2, nor is it unchallenged. It was the theory of plaintiff's case throughout that the written contract was plain and unambiguous and that it expressly provided that casings in all oil wells on defendant's property were to be sold to plaintiff with the result that it was not open to attack collaterally or by extrinsic evidence. By its motion to dismiss the defendant contended that the contract clearly excluded the casings from the sale, and thereafter attempted to avoid the issue by plead

ing mutual mistake. But since the court insisted on considering all of the evidence for the purpose of deciding the issues tendered by the amended complaint as well as those tendered by defendant's cross-complaint. the interpretation of the contract, as plain and clear or as uncertain and ambiguous remained a vital issue. If the written contract was clear, certain and unambiguous, it was free from attack except by proof that the parties had entered into a prior verbal contract, which differed from the written contract as alleged in defendant's counter-claim or cross-complaint and in respect to the matters therein specified, yet no such oral agreement was proved or found by the court and by finding 30 the court declined to make a finding on this proposition.

We have concluded the analysis of the evidentiary findings. The others are dependent upon them. It has been shown that none of the evidentiary facts which concern the intent of the defendant corporation have any rational connection with that intent. The findings of the vital ultimate fact that defendant intended to exclude all casings in the oil wells from the sale, are, a part of finding 8 and the last sentence in Finding Number 23. A second group of findings of ultimate facts are also left without support. This group finds that during the period of negotiation and when the written contract was executed plaintiff did not intend that the sale should include said casings. They are parts of findings 5 and findings 23 and 26.

Number 4 and a part of findings 3 and 5 are to the same effect as to the intentions of both parties. Findings 10 and 25 conclude that plaintiff and plaintiff's employees knew and suspected that defendant did not intend to sell the casings, etc. Number 25 also finds that the failure

of the written contract to express truly the intentions of the parties resulted *from defendant's* mistake and number 28 attributes said failure to a "mutual mistake" of both parties.

Finding 5 and 29 describes the mistake or mistakes as failure to exclude the casing in the sale and to relieve plaintiff from the obligation of abandoning the wells and removing or disposing of the casings.

It has been shown that said findings of ultimate facts are each and all are either contrary to the evidentiary finding or unsupported by any of them, because such evidentiary findings have no rational tendency to support said ultimate facts or actually create a contrary inference.

#### IV.

#### **The Findings Are Insufficient to Support the Conclusions of Law or the Judgment.**

The outstanding defect in the findings as failing to support the conclusions of law and the judgment is the absence of any finding that the parties to the Written Contract ever entered into a prior and different contract, oral or written.

It has been shown by citation of California decisions that even where a case is based on Section 3399 of the Civil Code, a prior agreement must be proved to entitle one of the parties to the remedy of reformation, because the essence of that relief and its sole objective is to make the contract which has been mistakingly drafted and executed conform to the genuine agreement on which the minds have met.

**V.**

**The Conclusions of Law Do Not Sustain the Judgment.**

The conclusions of law are insufficient to support the judgment because they adhere to the same fallacy which has been pointed out in presenting Point IV. No conclusion of law refers to a prior agreement. It is nowhere concluded that the changes directed to be made are for the purpose of conformity with a prior agreement, and there is no indication that any conclusion is based upon any finding of fact that a prior agreement had been made by the parties.

This fact is a final and conclusive answer to any possible contention that somewhere, lurking in the elusive and indirect language which is employed in many of the findings, is an implied finding of a prior mental concord between the parties.

However, the conclusions entirely ignore the essential element of a prior and different agreement.

The conclusions of law also omit the ingredient of lack of laches or negligence upon the part of the defendant in making the mistake which the findings charge the plaintiff with having suspected. It seems probable that the effort expended in absolving defendant's employees of negligence in the findings would not permit a repetition of that mental feat in the conclusions of law.



## CONCLUSION.

The nature of the case and of the assignments of error have militated against brevity. From an endeavor to attain it, however, certain matters have not received the attention which they deserve. Of these, only one will be here discussed. When a party seeks reformation on the ground of mistake it is well settled that he must show how the mistake was made and what cause it. Otherwise the court has no means of knowing or finding that the cause was not such party's gross negligence. In the instant case the defendant made no attempt to comply with this requirement. On cross-examination some facts were revealed. It will be remembered that plaintiff's offer [Plaintiff's Exhibit No. 2; R. p. 215] with \$22,000.00 check enclosed covered everything on the property described, excluding certain items, but not the casings. Upon its receipt, defendant's memorandum of "Sale of Material and Equipment" specifies, "Everything will be sold to the above with the exception of the following:". Casings are not excepted. Mr. Davis, whose duty it was to negotiate such sales, drafted this memorandum [R. p. 323]. Kelly, who executed the written contract for Richfield, read the offer, saw the check, and approved the sale memorandum. He so testified on cross-examination [R. pp. 322, 323]. However, he gave no explanation of his apparent gross neglect in approving a transaction and these two instruments each of which clearly evidences the sale of the oil well casings to plaintiff.

Mr. Davis admitted that he dictated Exhibit 1 after receiving the offer [Plaintiff's Exhibit 2], and the check. He identified said exhibits, and Plaintiff's Exhibit 3 (the acceptance of said offer) [R. pp. 213-223]; he said that

Kelly wrote the letter of acceptance but Davis saw it, and immediately before it was written Davis had telephoned to Ferer and stated that the offer had been accepted [R. pp. 225, 226]. Said letter covers all material and equipment belonging to Richfield on said property, without excluding the casings. Without explanation, it is certain that Davis was thus four times grossly negligent, and he never explained what caused him to write and sign the acceptance, which purported to convey away Richfield's casings, contrary to the known intentions of Richfield. It is unnecessary to go on with the other documents and the meeting in the office of attorney Paradise, his preparation of the written contract, and the responsibility of Davis, Kelly and Montgomery for its provisions which clearly sold the oil well casings to Ferer & Sons.

The plain truth as shown by the record, which defendant does not deny, but relies on as a mistake, is that throughout the whole final negotiations and the actual sale defendants employees Kelly, Davis, Montgomery, Paradise, and even McGahan were repeatedly and consistently guilty of the grossest kind of negligence, if their statements and actions were mistakes, as defendant asserts and the court finds, and nowhere and at no time did any one of them, in their several affidavits and testimony, offer a word of explanation or supply the court with any information as to the cause of said monumental mistake which was a composite of at least twenty-five mistakes made by these employees. Hence there is no evidence in the record to support finding number 29 which absolves the defendant of negligence and asserts that "the mistake \* \* \* was not caused by or the result of negligence on the part of defendant."

This finding was plucked out of thin air by the court. It was a pure assumption or presumption against the integrity of the written contract, without which the judgment could not have been rendered for the defendants.

Upon all of the grounds and for all of the reasons set forth heretofore in this brief appellant asks that the judgment herein be reversed.

Respectfully submitted,

CARL B. STURZENACKER,

PHILIP N. KRASNE,

*Attorneys for Appellant.*







## SUPPLEMENT.

The following is a summary of the testimony given at the trial upon which, together with exhibits, the findings, conclusions of law and judgment were based:

HAROLD E. DAVIS:

### *Cross-examination*

By Mr. Sturzenacker:

On, or about the month of August, 1940, I notified Mr. McGahan, the storehouse supervisor of Richfield Oil Corporation, that the management had decided to sell certain of the surface equipment at Casmalia and requested Mr. McGahan to notify prospective bidders that such surface equipment, with certain exceptions, would be made available for sale." [R. pp. 196-197.]

My title with the Richfield Oil Corporation is buyer in the purchasing department; Mr. H. H. Kelly is in charge of that department; as part of my duties I have something to do with the sale or the preliminary negotiations for the sale of salvage and worn out equipment. I am familiar with this equipment that is in issue here at Casmalia. I was first on the ground in September, 1940. Since 1927 I have been with Richfield. During that time either Richfield or their predecessors has owned the property as Casmalia [R. p. 200]; Richfield did acquire it sometime around 1928. [R. p. 201.]

Mr. Paradise: It was stipulated that the wells had not been operated since October, 1925, anyway, prior to the time Richfield acquired it.

Mr. Paradise: The Richfield Oil Corporation acquired Pan American's properties in March of 1937 in connection

with the reorganization under 77B of the Bankruptcy Act of Richfield Oil Company of California which were proceedings in this District. [R. p. 202.]

The Witness: Selling the equipment on the Casmalia lease has been discussed over quite a number of years. I received instructions to conduct negotiations for the sale of salvage from Mr. Kelly. I recall that, sometime in August, 1940, I was notified by Mr. McGahan, the storehouse supervisor of Richfield Oil Corporation, that the management had decided to sell certain salvage equipment at Casmalia. [R. p. 203.] Prior to that time I believe we had disposed of some of that a year or so—I conducted the preliminary negotiations for selling it. Negotiations were finally completed by Mr. Kelly. I negotiated with somebody who was a prospective purchaser, a fellow by the name of Anderson, of Santa Maria. [R. p. 204.] Mr. Anderson finally bought some of the equipment there. He purchased some of the tubing, sucker rods and pumps and some other obsolete equipment which we had in the wells and on top of the ground. That was equipment from the producing unit. He didn't purchase any refining equipment to my knowledge. That is just the tubing. That was prior to the time I made a trip up there. I was fairly familiar with what was there through correspondence that we had and inventories that were available. [R. p. 205.] I would say that the Anderson deal started sometime in the early part of 1940. At that time our inventory disclosed that there were tubings and sucker rods in the various wells.

The Court: Do I understand your testimony to be that the transaction with this man Anderson of Santa Maria included selling to him all the sucker rods and tubing



which could be recovered, together with such surface equipment, and that all the derricks were to be dismantled and burned? [R. p. 206.]

A. That is right; yes, sir. May I add the surface equipment in the immediate vicinity of the wells?

Also the walking beam or the engines or anything else that might have been used in the producing of oil from those particular wells; whatever happened to be right there that was no longer of any value to us.

I buy tubing and sucker rods quite often for our company. So far as I know, however, there was nothing about the tubing or the sucker rods that made them obsolete except that if they were good, we would be using them somewhere else. [R. p. 207.] When he started to work on those wells I would say it was sometime in the spring of 1940 that he started and that he finished sometime in the summer or late summer. [R. p. 208.] We have at the office an inventory of the equipment that we sold to Mr. Anderson and the price.

Mr. Anderson did all of the work on the property that he was supposed to do under the contract to my knowledge. [R. p. 200.] I was up there in September of 1940. I didn't see any derricks still up. The portion of the property which I went over was around the refinery and the tanks that were to be retained and the dehydrator plant and where the superintendent's house is and a few of the wells in that particular area. Wells that were close to those particular units I have mentioned. We didn't go up to the ravine where the wells are in the upper end of the property. I believe the first time I had seen Mr. Clements was when he came in my office with Mr. Ferer

in the early part of 1941. [R. p. 210.] I don't think I had ever met him before. It is possible I had dealings with him between 1938 and the time he came in the office with Mr. Ferer. I remember having some refinery equipment that we sold about that time or prior to the Ferer deal to somebody at Santa Fe, to somebody but it wasn't Clements as I remember. It seems to me like it was a person by the name of Colin. [R. p. 211.] I did not hear Mr. Clement's name mentioned in connection with Mr. Colin, but it is possible that he could have been involved in that deal. [R. p. 212.] It may have been probably in the fall of 1940. The Casmalia deal was generally discussed but I can't recall what we talked about or what our discussions covered. I recall talking to Mr. Clements in my office with Mr. Ferer on the 8th day of January. That was the time that Mr. Ferer paid the \$22,000 for the property. Prior to the time that Mr. Clements and Mr. Ferer came to my office on the 8th day of January, I was familiar with an offer that Aaron Ferer & Sons had made to purchase the Casmalia equipment.

Mr. Sturzenacker: We would like to offer this offer as an exhibit, Your Honor. [R. p. 213.]

The Court: To avoid confusion, let's preserve the number that it has and it will become Plaintiff's No. 2 in evidence. [R. p. 214.] Plaintiff's Exhibit No. 2 is a letter dated December 10, 1940, addressed to the defendant "Attention: H. E. Davis, Purchasing Department," signed Aaron Ferer & Sons, by Morris Ferer, bring an offer of \$22,000 for certain material on the defendant's Casmalia property. [R. pp. 215-216.]

I am familiar with a letter, dated December 10, 1940, on the letterhead of Aaron Ferer, addressed to Richfield

Oil Company. It is the letter that has been introduced in evidence and has been marked. I am familiar with another letter, on the letterhead of Richfield Oil Company, signed by Mr. Kelly, that has heretofore been offered by the plaintiff as Exhibit No. 3 for identification dated January 2, 1941.

Mr. Sturzenacker: We will offer this, may it please the court, in evidence, to bear the same number that it bore for identification, No. 3.

The Court: It will be so admitted and marked. Plaintiff's Exhibit No. 3 is a letter addressed to Aaron Ferer & Sons, attention Mr. Morris Ferrer, signed, Richfield Oil Corporation, H. H. Kelly, Purchasing Agent, dated January 2, 1941, confirming a conversation of the same date, accepting the said offer, Plaintiff's Exhibit No. 2. I am familiar with a piece of thin white paper, typewritten, marked "Sale of Materials and Equipment at Casmalia," which has heretofore been offered by the plaintiff as Exhibit No. 1 for identification. I prepared it. January 8, 1941, indicates the date when it was prepared. The initials, H.E.D. are my initials.

Mr. Sturzenacker: We would like at this time to offer this in evidence with the same number, Plaintiff's Exhibit No. 1.

The Court: It may be admitted and so marked. [R. p. 219.] Plaintiff's Exhibit No. 1, bears the caption "Sale of Material and Equipment at Casmalia." It is addressed to Aaron Ferer & Sons, acknowledges "payment: Cashier's or Certified check in the amount of \$22,000.00, payable in advance, and describes material and property sold, and enumerates "exceptions", signed at the bottom, "H.E.D. (Stamped) Pltf's Ex. No. 1. Filed 9/3/42.

Q. By Mr. Sturzenacker: Mr. Davis, called your attention to Plaintiff's Exhibit No. 2, this offer, it says, "We are pleased to submit our bid in the sum of \$22,000.00 to cover all tanks, pipe, valves, fittings, buildings, boilers, and all other materials now situated on your Casmalia refining and producing property, plus pipe line running from the aforesaid property to and including loading rack adjacent to the railroad track, one-half mile west, including boiler and other incidental materials. We exclude the following "items" and then appears "superintendent's house, car barn", and so forth. Did you have any inventory of that property on the Casmalia lease at that time? A. We had an inventory that was several years old. I did not have one in my possession. I was not familiar with all of the tanks that were on the property. At that time when we received this bid from Mr. Ferer our company was to reserve six large steel storage tank [R pp. 221-222]; I imagine there were more than 25. There was a few tanks immediately surrounding the refinery property which were used in connection with refining. I assume the rest of them were production tanks. These six steel storage tanks that we reserved, I think most of them were on the north side of the creek, near the machine shop. I believe they were just north of the creek. There might have been one of them south of the creek. Six shell stills, plus one shell still still bottom were previously sold to the O. C. Fields Company. I had conducted that sale. [R. p. 223.] Certain 4-inch tubes were previously sold to the West Coast Oil Company. We were reserving the superintendent's house and garage and the building now used as the cow barn. When I was up there in September I didn't notice any cows around the place. I think most of the tanks had

a little oil. One of them had considerable oil that was sold to the Casmite Company or stored for the Casmite Company. Those numbers in the letter of acceptance of January 2 were put on by the operating department. Twelve dehydrators belonging to the Petroleum Rectifying Company, are mentioned in this acceptance. They belonged to that particular firm. [R. p. 224.] I had a telephone conversation which that letter refers to. I dictated the letter.

Q. At this telephone conversation, did you discuss with Mr. Ferer excluding any other property from the sale except that mentioned in this letter of December 10, 1940? A. I think not. [R. p. 225.] But the letter was written immediately after our conversation which would indicate that we had covered everything in the letter. The information that I got about the storage [R. p. 58] tanks came to me from the producing department. I believe that note was written when Mr. Ferer was there. He was present while I dictated this letter and I handed it to him. On this notation we stated, "Purchaser shall remove all oil in tanks from the property". That was oil that had been produced on those premises so far as I know. I don't think it had been stored there by Richfield [R. p. 226] I don't know what this property was being used for. Nothing, I presume. I put in the clause that it was to be fenced so the cattle couldn't get into the sumps. There may have been cattle grazing around there. However, that is a problem that is taken care of by the operating department again. Someone in the operating department told me to do that. I also added in here, "All ditches and pits should be filled in after removal of the pipe and other equipment and left in safe condition.

I believe it was part of my idea. [R. p. 227.] That was to fulfill the previous clause relative to the instructions I had received from the operating department to prevent the cattle from getting bogged down in the sumps and so forth. I stated, "All ditches and pits should be filled in after removal of pipe." I knew that the pipes in Casmalia on the lease there that were to be removed were, some of them, below the ground. I say here, "All ditches and pits should be filled in after removal of pipe. It is possible in removing any pipe lines which were underground that pits and ditches would, naturally, be made which were to be filled in after those pipe lines were removed. This ground is rather uneven and sort of rugged. [R. p. 228.] It was possible for me to see on our trip up there, while I was examining the refining unit, pipe lines that ran from there to other tanks in the field. I saw other tanks where the pipe line was coming up out of the ground and going into the tanks. I believe the letter was written after that telephone call accepting his bid. And then they arrived at my office—just Mr. Clements and Mr. Ferer. I had a conversation with the two gentlemen at that time. As I recall, Mr. Clements asked what our reason was for not selling the six remaining tanks or the six tanks which we were excepting, and I called Mr. Montgomery and asked him why he wanted to retain those tanks and he explained again to me that it was for the purpose of storing oil in the event of and when we might reopen some of the wells for production. I told that to Mr. Clements and to Mr. Ferer. The pipe lines up to the tanks were sold up to a certain point. As to how close to the tanks those were marked on the property, I imagine, around three or four hundred feet away from the tanks except any pipe lines interconnecting those six tanks we

were to retain. As to whether I told him that those pipe lines to those tanks were to be excluded I believe it is in the contract. I am familiar with the contract that was finally adopted.

Mr. Krasne: Perhaps Mr. Paradise will stipulate that there was no exclusion for any of the pipe line running up to those tanks provided for in the contract. [R. pp. 229, 230.]

Mr. Paradise: No; that is not correct. They were excluded. I might perhaps save time, because there is no mention of that in the contract, by saying the exclusions are shown on the map, Mr. Sturzenacker, if you care to borrow that.

Q. By Mr. Sturzenacker: Will you glance through this contract, Mr. Davis, and show me if there is any place in the contract that excludes the pipe lines running up to the tanks. A. Here is one place, Mr. Sturzenacker.

Q. Where is it? A. Right here.

Q. You are pointing not to "and major suction and discharge oil pipe lines connecting such tanks approximately as indicated in red on the map attached hereto and marked Exhibit A. A. That is right. I believe we did discuss those pipe lines running to and from those tanks. [R. p. 231.] The original contract with the map attached to is introduced by stipulation as the plaintiff's exhibit next in order, No. 4. Plaintiff's Exhibit 4 is identical to Exhibit "A" to Amended Complaint. [R. p. 232.] Referring to Plaintiff's Exhibit No. 4, which is the original contract and the map attached thereto some red lines around a circle, which is marked "Riveted steel tanks" and so forth enclose the six tanks that were referred to in the exceptions to the contract. The red lines leading from

tank to tank are the lines that I referred to that were excepted. We discussed excepting the water lines that were to be used to serve water to the superintendent's house and the cow barn or, rather, the watering trough for the cattle and also the gas line which was to be used for bringing gas from one or more wells, whichever was necessary, in order to furnish the superintendent's house with gas. The pipe line, the gas pipe line, that is excepted, is the running along from the portion near well No. 36. [R. p. 233.]

That pipe line where the loading rack was, was included in the sale of equipment to Mr. Ferer. I don't believe that there were pipelines running from tanks in various portions of the field to these tanks that were excluded. Those were communicating lines between the tanks which we were reserving. [R. p. 235.]

Q. None of those lines that are in red go to any wells, do they? I mean the lines that are around the tanks, with the exception of the gas line that you referred to a few moments ago? A. I don't believe they do. [R. p. 236.]

Smaller lines on the inside of the large gathering lines indicate to me that they might have been steam lines used to heat the oil. These steam lines were connected with boilers and other equipment on the field that were used for heating steam and running it through the lines. I imagine they would be hooked up to boilers or were at one time. The boilers were still there. Those boilers were still there. Those boilers were included in the sale of merchandise to Mr. Ferer. [R. p. 237.] I believe we



asked the refinery department if they wanted any of the material or equipment that they might use on some other facility in some of our other operations. My information came from the production department. [R. p. 238.] They told me to exclude these tanks and the pipes running from the tanks. Mr. Montgomery gave me an instruction to exclude the superintendent's house and the cow barn. I discussed the sale of these salvage goods with Mr. Clements and Mr. Ferer, and Tom McGeeny of the Union Oil Well Supply Company at Long Beach. [R. p. 239.] I received other bids from other persons for the purchase of equipment on the Casmalia lease. We had a number of different types of bids. Some bids were submitted on buildings only and some on other individual pieces of equipment. [R. p. 240.] I believe the other bids that we received were in writing. [R. p. 241.] This bid from Mr. Ferer came to Mr. Kelly and then to me. I discussed it with Mr. Kelly, and later on Mr. McGahan.

*Redirect Examination.*

I testified that in connection with this sale of tubing and sucker rods and the derricks to Mr. Anderson I had an inventory of the tubing and sucker rods. I received that from the production department.

A. It is my understanding that it was an inventory that had been prepared or a record, rather, that had been prepared of the installations as they were made during the time when the property was operated. [R. p. 242.] The

inventory had been prepared prior to that time. Some of the derricks had fallen down and those remaining erect were in pretty bad shape. They were composed of wood. [R. p. 243.] Mr. Anderson was required to pull the tubing from the wells which he could recover. [R. p. 244.] The first conversation I had with Mr. Montgomery was, I believe sometime in September or October of 1940. [R. p. 246.] That was after Mr. Kelly instructed me to make arrangements for this proposed sale. [R. p. 247.] I asked Mr. Montgomery to give us an inventory of what items, what surface items, he wanted reserved and not sold off of the property. [R. p. 248.] In our conversation I mentioned Casmalia. In first contacting Mr. Montgomery, he stated that there were certain tanks and certain lines which were to be excepted. [R. p. 249.] I don't recall whether he specified why he wanted those specific items excepted or not. I had another telephone conversation with Mr. Montgomery on December 8th, when Mr. Clements and Mr. Ferer were present in your office. This was in the presence of Mr. Ferer and Mr. Clements. [R. p. 251.]

Those are the six tanks that were excepted. And so I called Mr. Montgomery on the telephone and asked him why those tanks were not included in the sale and he said he wanted to retain them in the event that the wells were ever opened up for production; that those tanks would be used as storage. I repeated the conversation to them as soon as I hung up. [R. p. 252.]

H. E. DAVIS,

recalled.

*Redirect Examination*

resumed.

Q. By Mr. Paradise: Mr. Davis, what instructions did you receive from Mr. Kelly at the time of the commencement of this transaction? [R. pp. 257, 258.] A. He instructed me that the management desired to dispose of certain surface equipment facilities at the Cas-malia property and to contact the interested parties to find out what, if any, of the surface equipment was to be retained on the property. My duties as a buyer in the purchasing department also included the sale and disposal of salvage equipment. In connection with transactions for the sale and disposal of salvage equipment I have on occasion used the words, "surface equipment", numerous times. Surface equipment is a common and ordinary phrase in the oil industry. It pertains generally to equipment and facilities located on top of the ground and, to go further, pipelines, some of which might be buried a small amount underground. Pipelines are considered surface equipment in the oil industry. [R. p. 260.] There are other types of equipment in an oil field which are not surface equipment. There is subsurface equipment. Illustrations of subsurface equipment are casing in the well, tubing, sucker rods and deep well pumps. The common and ordinary meaning in the oil well industry of subsurface equipment is, more, I suppose you would say, in a vertical position in the ground. Generally speaking, casing is cemented in the well. [R. p. 261.]

In the telephone conversation to which I testified yesterday I told Mr. Montgomery that we were making ar-

rangements to dispose of certain surface equipment at Casmalia and asked him what exceptions there were or what items of equipment he wished to retain on the property. There were six tanks that he wished to retain and a gas line to supply to (100) superintendent's house with fuel and a water line and the water tanks and water pump. There were to be interconnecting lines which were also to be retained around the tanks. [R. p. 262.]

At the Court's request, I have produced the contract, dated March 12, 1940, between Richfield Oil Corporation and W. R. Anderson, doing business under the name of Petroleum Service Company.

Mr. Paradise offers in evidence a certain written instrument. On stipulation of Mr. Sturzenacker, the Court orders the same admitted and marked Defendant's Exhibit No. A being a contract between Richfield Oil Corporation and W. R. Anderson dated March 12, 1940. [R. p. 265.]

The Witness: I am familiar with this contract. Casing is ordinarily cemented in a hole and referred to at times as the protective string. Tubing is generally used to produce the well through the tubing, that is, to bring the oil up through the tubing. Paragraph 4 (e) of this contract reads:

"It is expressly understood and agreed that in connection with the work described under sub-paragraph (d) hereinabove, contractor shall not be required to engage in 'fishing' for any of the pumps, rods, and tubing in said wells which, prior to the commencement by contractor of such work, shall be stuck, frozen, parted or collapsed in the respective wells: provided, however, that in the event that any of said pumps, rods or tubing shall

become stuck, frozen, parted or collapsed as a result of the performance of any of contractor's work, contractor shall, at its own cost and expense, perform any 'fishing' operations necessary to remove the same. In the event that contractor shall discover that any pumps, rods or tubing shall be stuck, frozen, parted or collapsed, as aforesaid, contractor shall immediately report the same in writing to Richfield's representative." I conducted the negotiations for the execution of this contract. The production department instructed me concerning the inclusion in the contract of the paragraph I just read. [R. pp. 279, 280.] Referring to Plaintiff's Exhibit No. 4, which is the contract between Richfield and Aaron Ferer & Sons, and to the map attached thereto as Exhibit A, on this map you will note that this line is a 2-inch gas line. I am referring now to the line in red that leads up to Well No. 36. This line also extends to the lower end of the map. That is in an easterly direction, and then runs north to Well No. 44. The line is in red. We stopped here and put in this stipulation that states, "And any extensions of gas line necessary to furnish gas to Duncan's house." [R. p. 281.] This line extends on beyond Well No. 44 and apparently is split up in two lines and it goes on to Well No. 46. This is the same 2-inch gas line extending on here and from there it goes up to a boiler house, apparently. [R. p. 282.]

*Recross-Examination*

By Mr. Sturzenacker:

Mr. Montgomery first told me to exclude these gas lines or this gas line running to Mr. Duncan's house some time during the latter part of September or the first part of October. I read Mr. Ferer's offer of December 2nd

that has been introduced here as Plaintiff's Exhibit No. 2. Nothing was said in there about reserving the gas line, was there. That is right. I had a telephone conversation with Mr. Ferer about the 2nd of January, which is the same date.

Q. I show you Plaintiff's Exhibit No. 3 and ask you if you said anything in there about reserving the gas line.

A. Apparently not. [R. p. 282.]

Q. On the 8th of January, when Mr. Ferer and Mr. Clements came to your office and gave you the check for \$22,000, did you have any conversation with them at that time about reserving the gas line? A. I may have. I don't remember.

I wrote a memorandum when they were there at that time. That is right. Looking at Plaintiff's Exhibit 1, there is not anything on there that says anything about reserving the gas line.

Q. Isn't it a matter of fact that the first time you heard anything about reserving that gas line was after you had accepted Mr. Ferer's bid and received his money?

A. No; I don't think it is.

Q. But you never discussed with Mr. Ferer or anybody connected with his organization the question of reserving that gas line? A. Not that I recall.

I testified this morning that in my first conversation with Mr. Kelly he told me to make arrangements or to start to make arrangements to sell the surface equipment of the Casmalia lease. [R. p. 283.] That was some time in August or September, 1940. I read the communication of Mr. Ferer which was received in my office on the 11th of December, Plaintiff's Exhibit No. 2.

There is not anything I recall in this document that says anything about purchasing the surface equipment on the Casmalia property. As a matter of fact, it says the refining and producing property.

Q. Did you say anything in your telephone conversation with Mr. Ferer on the 2nd of January about Mr. Ferer only purchasing the surface equipment on the Casmalia property? A. I don't believe I did.

There is not anything in your Exhibit No. 3, which is the letter of the 2nd of January, that says anything about Mr. Ferer purchasing the surface equipment on the Casmalia property?

Q. And is there anything in your note or memorandum of the 8th day of January, Plaintiff's Exhibit No. 1, that says anything about just purchasing the surface equipment?

Mr. Paradise: If the Court please, I object to this line of questions and move to strike the answer to them. [R. p. 284.]

The Court: I think the fair meaning of the testimony and all counsel really means is that the term "surface equipment" is not used in any of the exhibits referred to and that that is all the witness means by his testimony.

Mr. Paradise: Yes.

Mr. Sturzenacker: That is satisfactory.

Mr. Clements and Mr. Ferer came to my office in response to the letter which I had written on the 2nd, telling them to come in within 10 days with a check for \$22,000, and to deliver the check to me, and I made up this memorandum, and then some conversation was had between me and Mr. Clements relative to the sale by Richfield and

the purchase by Ferer of some of the excepted property, to-wit, the tanks; it was at that time I called Mr. Montgomery. [R. p. 285.] The conversation took place before this Exhibit No. 1 was drawn up. [R. p. 286.] The reason for their visit there was to comply with my letter of January 2nd, signed by Mr. Kelly—to come in with a check. I am familiar with what is necessary to produce oil wells to a certain extent. I am familiar with this Anderson contract. [R. p. 287.] This contract, referring to page 3 and to the paragraph designated as paragraph (a), I am familiar with that clause. Under that clause Anderson was to dismantle all of the derricks. [R. p. 288.] He was to take it away and burn up all of the wood and refuse resulting from that. Under paragraph (b) he was to clean out all of the cellars, pits, and sumps, and dispose of all the oil, tar and waste. He was to fill up all of the cellars, pits, and sumps. We required him under this contract to leave the tubing and the sucker rods on the property until such time as he had completed this work. I didn't question the reasons why they were removing the tubing and sucker rods. The production department told me to have the tubing and the sucker rods removed, the derricks pulled down, the cellars and pits filled up and the sumps cleaned out and filled. [R. p. 289.]

The fact that my inventory showed that there were tubes and sucker rods and pumps in the wells would indicate to me that they were necessary in order to produce those wells. I would assume that. In this conversation on the 8th of January Mr. Montgomery said that he wanted to keep the tanks there for storage in the event they reopened the wells for production. I knew there



were pipelines running from those wells to certain storage tanks. [R. p. 291.] We meant in this sale to include those pipelines running from those various wells to production tanks. Mr. Montgomery didn't tell me to reserve those pipelines from those wells to tanks, the storage tanks. I am familiar with the rest of the bids that have been received by my company. There are only approximately three bids that were bidding on the whole equipment. Three or four of the Western Oil Fields Supply Company and one of R. Levinson and one of Dulien Steel Products, Inc. were three that were received by me for the purchase of the equipment at Casmalia. [R. p. 292.]

As to whether at the completion of the handing of this note or memorandum Exhibit No. 1, to Mr. Ferer and Mr. Clements I had a further conversation with them. I think not. I thought we went up to Mr. Paradise's office right away. [R. p. 300.] I had a conversation with Mr. Paradise and the gentlemen there. We merely discussed the formulation of the contract. I presume Mr. Paradise made notes or record of it. I showed him a copy of my memorandum that I had handed to Mr. Clements and Mr. Ferer that day, about excluding various things from the contract. I believe that was covered by Exhibit 1. [R. p. 301.] And my best recollection at the present time is that I did not show Mr. Paradise the offer of Ferer & Sons on the 10th day of December or the acceptance of the offer by the Richfield Corporation on the 2nd day of January. This exhibit numbers of those two instruments are 2 and 3. [R. p. 305.]

On January 8th Mr. Anderson had completed his work on the property. All of the derricks had been removed. I was up there in September. I didn't see any still stand-

ing. My records indicate that all of the work covered in the Anderson contract had been completed, including the cleaning out of the sumps and filling them. [R. p. 306.] There was a pipeline from the property to the loading rack. My description of surface equipment is that which is above the ground, and that which is buried to a shallow depth below the ground. That shallow burying would be about two feet. Mr. McGahan in my presence supplied Mr. Paradise with information relative to this contract. [R. p. 307.] One time that I know of was at the same time when Mr. Ferer and Mr. Clements and Mr. Paradise and Mr. McGahan and I all met in Mr. Paradise's office. I would say that was the day that we discussed the formulation of the contract. It was before the 17th of January. I do not recall at this conference in the office of Mr. McGahan stating to Mr. Paradise, in the presence of Mr. Clements and Mr. Ferer, that the only property sold or contemplated to be sold was the surface equipment. [R. p. 308.] I was never present at any other conference between Mr. Ferer, Mr. Clements and Mr. McGahan. I discussed the exclusion of the gas lines with either Mr. Ferer or Mr. Clements on some occasion. I believe that occurred on the occasion they came in and left the check with us for the sale of the equipment. In the common meaning of that expression, "surface equipment," pipelines are referred to as surface equipment. [R. p. 309.] These gas lines were discussed at the meeting with Mr. Ferer and Mr. Clements both in my office and in Mr. Paradise's office on the same day. [R. p. 310.] But I did not include the gas line in the memorandum Exhibit No. 1. I did include the water lines and the pumps. As a matter of fact, it was on the 8th when Mr. Clements and Mr. Ferer

were there, I actually discussed the water lines and the pumps. I believe they were discussed in my office also. I knew when I drew the memorandum that the gas line was to be excluded. I undoubtedly forgot it. [R. p. 311.]

HERBERT HUDSON KELLY.

*Cross-Examination*

By Mr. Sturzenacker:

Before proceeding with the cross-examination of Mr. Kelly, may we refer to the affidavit of Mr. Kelly on file and make certain motions to strike? [R. p. 314.]

The Court: I think what we ought to do at present is this, to deny the motion without prejudice to your renewing it. [R. p. 316.] They are ordered stricken out. [R. p. 318.]

Mr. Sturzenacker: We move to strike the remainder of that paragraph on the ground it is all alleged on information, that, "That affiant was and is informed by the production department of Richfield Oil Corporation that no casing can be removed from any oil well in California without abandonment of such well." [R. p. 320.]

Mr. Paradise: I will consent to the striking of that clause. That is from lines 10 to 27? [R. p. 320.]

The Court: That is, beginning with the words, "That affiant was"? [R. p. 321.] It is ordered stricken out. [R. p. 321.]

The first time that I met Mr. Ferer or Mr. Clements in connection with this transaction was January 8, 1941, when they brought in the check. Mr. Davis brought the check from his office to mine and I said I would like to

meet the gentleman. At that time this acceptance of the 2nd of January, Plaintiff's Exhibit No. 3, had already been signed by you and forwarded. Mr. Davis dictated and I signed this letter. Prior to that time, I had seen the offer of Mr. Ferer, Exhibit No. 2. [R. p. 322.] Referring to Plaintiff's Exhibit No. 1, which apparently is a memorandum of sale, Mr. Davis brought this to me and I approved the contents. I remember that. The first time that I did see it was the same day that Mr. Aaron Ferer and Mr. Clements and Mr. Davis were in my office. [R. p. 323.] I was not present in Mr. Paradise's office when the formal contract was drawn. I am familiar with the so-called Anderson contract. I knew what that provided for in the way of sale. Was producing equipment. I knew these wells had never been produced by Richfield. The superintendent's house and the cow barn wasn't part of the production equipment. [R. p. 324.]

I have been on the property once, about March 1941. Mr. Ferer was removing the stuff at that time. The pumphouse was still there, and the field office. I knew those were included in the contract with Mr. Ferer. [R. p. 325.] I know of boilers on the property. I knew those boilers were included in this sale to Ferer. And the pipelines to the boilers, except those that were reserved as connecting the six storage tanks. [R. p. 326.]

The information to which I refer I had at the time I signed the contract in question, which is dated January 17, 1941. I had that information prior to that time. [R. p. 329.] I executed this contract, Defendant's Exhibit A. I was familiar, at the date of the contract, with the fact that the derricks, tubing and rods, were to be removed. In August of 1940, a discussion

of withdrawing tubing, sucker rods and pumps, was brought up in the general meeting. That was a period after the execution of the contract with Mr. W. R. Anderson. [R. p. 330.] I have attended that meeting. The president, Mr. Jones, and three vice-presidents, Mr. Morgan, Mr. A. M. Kelley, and there was Mr. Montgomery and Mr. Autrey and Mr. Dinkins, Mr. Gross and Mr. McKay and myself. Mr. Boner and Mr. Ragland, and I think that is all. They are all heads of their respective departments. [R. p. 331.]

The production department, through Mr. Montgomery, brought the state of these particular wells to the attention of the management and Mr. Jones and recited that, the oil being of a corrosive nature, it had or possibly had corroded the tubing and the rods to the extent that it would be better to pull them at that time than to wait until a later date, where they might have great difficulty in pulling them. [R. p. 332.] That was discussed at that meeting to which I have referred. [R. p. 333.] Mr. Montgomery was the principal talker and it was mostly on his decision, approved by the balance of the management, that it be done and provision made for future control of the wells. [R. p. 334.] The discussion relative to this Anderson contract was prior to the date of this contract and the discussion I have just referred to was relative to this contract. [R. p. 335.] The question of the removal of the tubing and rods and derricks from Casmalia was not discussed by Mr. Montgomery or by anyone else at any of the executive meetings which occurred before I signed that contract with Mr. Anderson. At these executive meetings, there was discussion concerning the production of oil from the wells at Casmalia. Prior to January 17, 1941. [R. p. 336.]

*Recross-Examination*

By Mr. Sturzenacker:

When the conversation that took place in this meeting of August 1940, the rods and tubes had been removed from the Casmalia wells. [R. p. 336.] The derricks had been removed. Discussion was had at that time about keeping the production equipment there for the purpose of producing those wells again. The only equipment to remain, surface equipment, was that indicated on the map in red. That was the time that the powers that be, authorized me to sell the rest of the equipment on the Casmalia lease. Nothing was said at this meeting about reserving any pipelines. [R. p. 337.] This tubing that was mentioned in the contract with Mr. Anderson is not casing. I signed this contract. This contract was prepared by Richfield. I wasn't prepared by Mr. Anderson. At this meeting nothing was said by Mr. Montgomery or anybody else about the rods and tubing corroding. [R. p. 338.] That wasn't discussed. [R. p. 339.]

At the August meeting they then directed me to remove the surface equipment. This was in August, 1940. I did not ever communicate with Mr. Ferer or Mr. Clements or anybody connected with his institution or his company [R. p. 340.] I had that in mind, that we were just going to sell the surface equipment when Mr. Davis showed us this memorandum which has been introduced as Plaintiff's Exhibit No. 1. I read it at that time. I noticed what it says on the fourth line, "Everything will be sold to the above with the exception of the following". I don't see where the words "surface equipment" are written into this. [R. p. 341.] I read those documents and saw that they didn't mention surface equipment. I did not com-

municate the fact that I was authorized only to sell surface equipment to Mr. Ferer or anybody connected with his concern. Speaking of 1941, that is, after the Ferer contract was signed, there was not a discussion at that time about reopening this field and trying to produce these wells. Not to my remembrance. These wells, never have been produced up to the present time. Not to my knowledge. Whether it had been decided within the year 1941 and after the Ferer contract was signed that the Richfield would attempt to produce these wells again, I couldn't say. [R. p. 342.] I could say that it had been discussed. Since the signing of the Ferer contract, it has been mentioned two or three times. It was discussed after I went up and visited on the property. [R. p. 343.] It is a matter of fact that our company gave Mr. Ferer notice to hurry up with the dismantling of the producing and refining facilities on that property after I visited up there in March. And after the question about reproducing the wells had been discussed in our board meeting, I didn't make any investigation myself before I signed the Ferer contract as to what portion of the merchandise sold to Mr. Ferer could be used in producing these wells. If a discussion took place in August, 1940 relative to reproducing this field, I was authorized to sell the producing equipment because we were afraid that, if—or let me put it this way, that the equipment as it was offered for sale would not have been in good enough condition in our estimation to have produced a well. Mr. Montgomery did not say anything about the half a mile pipeline running to the loading rack. [R. p. 344.]

The rest of the pipelines, the gathering lines, that went to the tanks and the boilers that heated the steam, was

described as surface equipment and should be removed and sold. Even though they were talking about reopening the field, nothing was said about reserving the oil house or the blacksmith shop. [R. p. 345.] Mr. Montgomery did not say he wanted the log books preserved. Not to me. Nobody said anything about saving the records of the wells and log books. Not to me. Or the field office, not to me. The contract with Mr. Anderson is dated March 12, 1940, there were discussions in the executive meetings that I have mentioned concerning the removal of the tubing and rods and derricks from those wells at meetings which occurred prior to the time that contract was signed. It was decided to remove them and my instructions were given to formulate the contract. [R. p. 346.] Mr. Montgomery made that as to the condition of the tubing and rods and derricks on the wells, one or two weeks previous to the contract of March 12, 1940, with Mr. Anderson. In August of 1940, at that meeting there was no discussion of this Anderson contract or of the removal of the tubing and rods under this contract. At that meeting the removal of the surface equipment was discussed. That was approximately the time when I instructed Mr. Davis to prepare for the sale of salvage equipment at Casmalia. [R. p. 347.] Referring to a paragraph in the Anderson contract on page 4-a which states, "Contractor shall not remove from any wells any of the casing or liners now installed therein other than said tubing, rods and pumps above described," I had this provision of the contract in mind at the time I signed that contract. I did sign a contract to allow them to remove numerous quantities of lapweld casing, which casing was used as tubing. I do not know of my own knowledge at all what the casing in the wells was. [R. p. 349.]



FRANK I. MCGAHAN,

called as a witness on behalf of the defendant, being first duly sworn, testifies as follows:

*Cross-Examination.*

[R. p. 350]:

The first time I received any instructions to sell any property at Casmalia was about two or three days before September 21st. [R. p. 351.] When I went on the property, I had an equipment map which the company usually has on leases of that nature and, as I made frequent trips after that date, after the 21st of September, I checked the equipment on this map and compiled notes in my notebook. I had a map which I understand is the same as the one attached to the contract. When I went up there in September, I knew there were some oil wells on the property. Much of the equipment that was there could be called producing equipment. There were some boilers. I was never there when the wells were produced. [R. p. 352.] I have been in the oil industry for some years. I am familiar somewhat with the transportation of oil through pipe lines. The type of oil that was produced at that Casmalia field was a very heavy grade of oil. That oil will flow through a pipeline, on a hot day, it would flow and on a cold day perhaps no. For the purpose of transporting the oil, it was necessary to have steam injected in the line in most cases. [R. p. 353.] Most of the tanks had oil in them. The steel tanks were in good condition but the galvanized tanks, that is, the corrugated flat tanks, were most of them in very bad condition. Of the steel tanks there were on the property 10 or possibly 12 steel tanks. Of the galvanized tanks, there was a large number. Under this contract some of

the steel tanks were sold, and all of the galvanized tanks, except one. [R. p. 354.] Some of the pipelines were sold under the contract. Those pipelines were not necessarily on the surface of the ground. Some of them were perhaps entirely under the surface from the beginning to end. They may have been buried from perhaps two feet to eight or ten feet. I consider pipe that is buried eight or ten feet as surface equipment. [R. p. 355.] I saw Mr. Clements out there twice, once before there was any work started and once while they were working on the lease. I am positive the second time I saw him was after the contract was signed. I looked over the number of times. In some cases the condition was bad and in other cases it was fair. Some of the pipes were in such a condition that they might be used if the field was going to be produced. The loading line that went down to the loading rack, was about a half mile long. The pipe was 6-inch [R. p. 356.] I believe the only outlet from the lease was these storage tanks, which was this 6-inch line, the loading rack line. Nobody ever told me, connected with Richfield, that, in August and September, 1940, they were going to reopen the field and produce oil from those wells. I did not offer this equipment for sale. I simply contacted and told people about it and took them up there and showed it to them. [R. p. 357.] I am in charge of the salvage department of Richfield. It is my job to dispose of surplus and useless goods, also, to salvage second hand materials that can be used or are usable by your company in other places. I have charge of the stores. [R. p. 358.] I actually went on the portion of the property where the wells are located. To be exempted from sale were: the oil wells, the six steel tanks, the dehydrators located on the lease, which did not belong to us,

and the superintendent's house and I believe the cow shed and the superintendent's garage and a 2-inch gas line from the superintendent's house to one or more of the wells. [R. p. 359.] Either Mr. Kelly or Mr. Davis told me that the oil wells were to be exempted, in a conversation in their office just prior to September 21st. I knew that the rods and the casing in the wells that had been used for tubing had been pulled out. I knew the derricks had been taken down. The condition of the boilers was that for ordinary modern practice they were obsolete. [R. p. 360.] I believe that I have known Mr. Zeidenfeld for possibly 7 or 8 years. During August or September, I talked to Mr. Zeidenfeld about this Casmalia property. He was buying from the company all kinds of obsolete scrap materials. Those purchases might run from 10 or 15 tons up to perhaps 100 or 200 tons. [R. p. 361.] The conversation took place in my office in Long Beach. [R. p. 362.] I said, "I have completed my little compilation here of the material on the lease up there and have it here so that I can tell you approximately how many boilers and how many pumps and how many engines and how many tanks and so on and how much pipe there is." And I said, "I have it here page by page, with the quantity and a weight estimate." And then I said, "I also have totalled up the entire weight estimate and have arrived at a figure of 1,500 tons, divided as you see it on these several sheets." I asked Mr. Zeidenfeld the first time I mentioned the pending sale to go up there with me sometime and look at it. I knew that he had not seen the property. This conversation took place the last of November or the first of December, 1940. [R. p. 363.] I told him how many tanks there were on the property,

and about tanks being excluded. [R. p. 364.] I referred to this property for sale as the Soladino lease. I referred to the fact that there was a refinery on the site. I got my information as to the various numbers of fittings and so forth from the equipment map in the past inventories that had been taken. Those inventories were not taken by me. They were taken by people working for Richfield. I believe that the last inventory taken on that lease was in 1930. [R. p. 365.] I knew the derricks had been removed. [R. p. 366.] I could not say that I ever told Mr. Zeidenfeld that the casing on the property or the wells on the property were to be excluded from this sale. Whether the casing or the wells on the property ever mentioned in any conversation between me and Mr. Zeidenfeld, to the best of my knowledge, they were not mentioned. I was present when the final contract of the terms of the final contract were gone over in Mr. Paradise's office. I had met Mr. Ferer, I believe, once or twice before that. I had met Mr. Clements before. I was present at this conversation in Mr. Paradise's office. I can't say I remember anything specifically mentioned about the wells in that meeting other than in connection with the gas line, which I remember being mentioned as being an exception which was to be made. [R. p. 367.] I knew there was casing in the wells. I knew that those casings and wells so far as our company was concerned were to be excluded from the sale. I saw the excluded items on there. I didn't see any casing excluded. [R. p. 368.] Or any wells. I did not say anything about not selling the wells or the casing or not mentioning them in the exclusion. I recall one change, and that was, I believe, the words "lumber and metal" were added. That

change was made at Mr. Ferer's request. I told Mr. Zeidenfeld that the estimate that I had of tonnage might or might not be correct because Richfield had only old records of the installations on this property. I asked him to go up there with me. He did not go up with me. I am not a petroleum engineer. [R. p. 369.] I never had any experience in the abandoning of oil wells. [R. p. 369.] Some of the casing can be removed under some circumstances without the abandonment of the well. I was not familiar with the casing record in these wells. I never saw the log books of the wells. [R. p. 370.]

FRANK I. MCGAHAN

recalled.

*Cross-Examination*

resumed.

At the time I was present at the meeting in Mr. Paradise's office, I don't remember whether or not this map which has been offered in evidence and attached to the contract in evidence was around there at that time. [R. p. 373.]

Not being sure whether I saw the map or not, I couldn't say whether I saw these red marks on that map in Mr. Paradise's office. I, myself, didn't make any of those exclusions or the red marks on the map. After receiving these instructions from Mr. Davis about selling the salvage equipment at Casmalia, I invited a lot of different people to bid on it. I remember the Union Oil Well Supply Company, for one, the Atlantic Supply Company as another one and the Western Oil Field Supply Com-

pany and I believe also that there were a number of the salvage companies here in Los Angeles. I did not furnish any of them any inventory. [R. p. 374.] I did not receive any bids. I don't remember of seeing the map with the markings on it at the meeting in Mr. Paradise's office, however, the map may have been there. After this conference in the office, I never did see the map. I am Supervisor of Storehouses. My duties have nothing to do with either the drilling of oil wells or the production of oil wells, or with the operation of oil fields where oil is being produced by Richfield. [R. p. 375.] It is part of my duties to assist the purchasing department in showing the salvage material to prospective bidders, as to what equipment is to be sold and what equipment is not to be sold. I obtain instructions in that respect from the management, the exploitation department. Mr. Montgomery is the head of that department. With respect to the sale of equipment at Casmalia, my preliminary instructions were from Mr. Montgomery. I received detailed instructions from the purchasing department. [R. p. 376.] The determination, of what equipment was to be sold was contained in those instructions. My instructions were to take prospective bidders to Casmalia and show them the surface equipment which we had for sale. The description was given as the surface equipment less certain things which were to be retained by the company. The exclusions were certain tanks, dehydrators, certain pipelines and some stills, that is, still bottoms and some stills. [R. p. 377.] The tanks that were included ranged all

the way from 20- to 30-barrel up to 5,000 barrels. They were located all over the lease. [R. p. 379.]

There was nothing other than the tank bottoms of oil in the tanks. Tank bottoms is the sediment in the bottom of the tank. I told Mr. Ferer the surface equipment less certain exceptions was to be sold. I told him that in our first conversation, with Mr. Ferer, some time between September and the first part of December. I don't remember just when. [R. p. 380.] I told Mr. Clements the same thing: the surface equipment less such items as the company wanted to retain. That conversation, to the best of my knowledge, took place around the first of November, 1940. I told Mr. Zeidenfeld that we were to sell the surface equipment less such items as the company wished to retain. [R. p. 381.] That conversation took place sometime in August or September, 1940. [R. p. 382.] I told Mr. Clements at the time I talked to him that I hadn't completed going over the lease yet and that I wasn't exactly sure what the company might wish to retain of the surface equipment and what they might want to sell. It was in the form of notes in my notebook. 10 pages of pencil notes are marked as Defendant's Exhibit 1 for identification. [R. p. 383.] These pages were shown to Mr. Zeidenfeld at that occasion. I told Mr. Zeidenfeld that I had now completed more or less of a record of what was up there and what we were going to sell, so I opened up the book and we went through these various pages and discussed the items on each one. I discussed

each page with Mr. Zeindenfeld. [R. p. 384.] I told him that my estimate was 1,500 tons. I told him the portion of the 1,500 tons was my estimate of the pipelines on the property. That estimate was approximately 920 tons. [R. p. 385.]

*Recross-Examination*

By Mr. Sturzenacker:

To the best of my knowledge and in going over the lease, I didn't find any of these tanks, which were included in the sale, which were full of oil. I couldn't state that I examined all of the tanks in the field that were sold, because there were so many tanks or many tanks that I didn't look at, that is, not the tanks to be retained. [R. p. 400.] The ones that I didn't look at, no; I couldn't state that they were not filled with oil. I don't know where that oil had been produced from. [R. p. 401.] I never took Mr. Ferer up to the field to show him the property. This first conversation with Mr. Ferer was over the telephone. He asked me what the company was going to sell. I told him we were going to sell the surface equipment from the lease less certain items which were going to be retained. [R. p. 402.] This first conversation I had with Mr. Clements was somewhere around the first of November. I didn't know whether he had any acquaintance with the field or not. As to what I told Mr. Zeindenfeld, I don't remember any particular thing, anything else, although we had a discussion of the matter and I might have told him a number of things. I can't



recall any particular item. [R. p. 403.] I am afraid I can't repeat any more of the conversation that I had with Mr. Clements. I cannot repeat anything in this telephonic conversation I had with Mr. Ferer, except that I was selling the surface equipment, all I can remember is the general conversation. I was present at this meeting in Mr. Paradise's office. [R. p. 404.] There was a discussion relative to certain items which were to be sold; yes. Mr. Paradise did pass out copies of the contract to everybody in the room. I don't recall reading it but I recall having it in my hand and going over it with the rest of them. I probably did hear the first part of that contract read, "all of the producing and refining equipment on the Casmalia lease". I did not hear anybody there say that the company was only selling the surface equipment. [R. p. 405.] I got my estimate of 1,500 tons of salvage. By taking the weights of the pipe and the boilers and the various pieces of equipment and totaling it all up. [R. p. 406.] Those figures shown there are the accepted weight for standard pipe. I did not measure these pipes. I took them from a map. [R. p. 407.] With reference to the word "sold" after certain of these items, the reason for that was that in working from this equipment map I first put down everything on there and then made that notation after certain items which were sold before Mr. Ferer bought the balance of it. Whether those words were on there at the time I showed these to Mr. Zeindenfeld, I believe they were, although I can't be positive. That is not a complete inventory. [R. p. 408.]

*Redirect Examination*

By Mr. Paradise:

That was not a complete inventory. In the sense that a complete inventory would have, necessarily, had itemized everything on the lease, which it was impossible for me to do inasmuch as a portion of the pipe was underground and the valves and fittings were concerned and there was no pipe under two inches taken into consideration. The descriptive matter was not complete as it would have been in an inventory. [R. pp. 408, 409.] I understood production and refinery equipment to mean all surface equipment that we had for sale. I did not have any other type of production equipment in mind at that time. My overall tonnage included the omitted items. That was the purpose of rounding out the 1,500 tons, to include such items as I had not listed, which I knew to be there. [R. p. 411.] Those omitted items were all pipe under two inches and valves, fittings and odds and ends of metal and steel on the lease. I understand pipelines to be surface equipment. It does not matter how deep on the property pipelines are buried as to whether or not they are considered surface equipment in the oil industry. [R. p. 412.]

*Recross-Examination.*

I expected these under two-inch pipelines to be sold. [R. p. 412.] In my opinion and from my interpretation of production equipment, it does not include casing. Rods, I would say, are production equipment. Pumps is surface and production equipment. Field tanks, yes. Dericks, yes. Engines, right. Boilers used for shooting live steam into the pipelines, yes, sir. And the pipelines that ran to the wells, yes. [R. p. 413.]

DAVID ZEIDENFELD.

I was an employee of Aaron Ferer & Sons, from January 1940 until approximately April or May of 1941. [R. p. 414.] I did solicit the purchase of material of that type from Richfield Oil Corporation during the time when I was employed by Aaron Ferer & Sons. I know Mr McGahan. I had some conversations with Mr. McGahan about the proposed sale of equipment at Casmalia. I believe there were two on this particular deal. The first conversation was about September of 1940. It took place at Mr. McGahan's office in Long Beach. [R. p. 415.] I don't remember whether there was stated whether it was going to be production or any other type of equipment. All I knew was there was going to be a big deal coming up. [R. p. 416.] Mr. McGahan told me that, "There is a pretty good-sized deal coming up, in which we are going to sell a lot of equipment." And I asked him, "How soon will that take place?" And he told me, "Well, it will take a little while yet. We don't know whether we are going to sell the whole works or not, or whether we are going to split it up in piecemeal". And I told him at a later date, when that comes up, to let me know and that is about the end of that conversation. And I know there was something mentioned about refinery deal coming up. [R. p. 417.] I came in the office that evening and told Mr. Ferer that there is a deal coming up at Richfield. And he told me, "Well, let me know when it is ready to take place." [R. p. 418.] I did not describe the transaction in any more detail to Mr. Ferer at that time. Our next discussion I believe was the latter part of November, at Mr. McGahan's office. Mr. McGahan said, I believe, that the property will be ready for sale within the

next short period, probably a month or so or three weeks or so, and it would be advisable for me to go up and see what is up there. And there were these so-called records that you have as far as what he thought might be up there for sale. [R. p. 420.] I am referring now to Mr. McGahan's pencil memoranda, which are Defendant's Exhibit B. I remember seeing these records but not actually having inspected them closely. He said, "Here is an idea of what we have up there." And I told him that, "I am not interested in knowing in detail what you have. I am interested in knowing in how many tons you have up there so we can determine as to how much we can bid on the material. Give us an idea as to the tonnage." I didn't look at them at all. The only thing is Mr. McGahan had them in his hand. I didn't inspect them minutely or microscopically to a point where I knew exactly what was in the records. I remember distinctly on page 1 where he showed me the page and I saw "1,500" encircled. And I said, "Is that the tonnage that you figure that is up there?" And he said, "Well, my idea of that is a rough estimate but don't hold me to it as to whether there is less up there or whether there is more up there. The best thing you can do is go up and look for yourself." [R. p. 421.] Well, he told me there was a lot of equipment for sale and there was a lot of pipe for sale. On this 1,500-ton calculation, I was told it was, roughly, 900 tons of pipe and 600 tons of steel. As far as I recall, it was refinery equipment and possibly tonnage of some of the steel in tanks. Well, I presume in the refinery equipment that the boilers would be in that deal, too. [R. p. 422.] Well, as far as I am concerned, I wasn't fully aware as to the production equipment being mentioned too much at that time. [R. p. 423.]

To give you a detailed idea of how I inspected these pages, Mr. McGahan had them in his hand and he thumbed through every page. And I told him, "I am not interested in anything in those pages but how many tons do you have?" And I wasn't inspecting those pages as he was going through them but he tried to give me an idea of what I might go up to see. But I told him, "As far as I am concerned, all I am interested in is how many tons you have up there." And, even though I would have inspected those minutely, he says not to hold him, Mr. McGahan, to anything in those things but to go up there and inspect it myself. I might have seen them and glanced at them but it didn't strike me at all as "Production" or "Refining", not being too familiar with the terms as a buyer of scrap iron and metals. I was simply interested in tonnage and I wouldn't recall exactly enough to say what was on those pages with the exception of that circle around the "1,500" that I distinctly remember. [R. p. 425.] I don't recall anything about lengths of pipelines. [R. p. 426.] Getting back to the fact of pipelines, I don't remember of we having discussed pipelines too much. It was just the idea I was interested in so much pipe up there and I think the word "pipe" was more or less discussed. I don't think much more was discussed with the exception of to go up and see what is there. Mr. McGahan suggested that I might make a date and meet him there sometime and inspect what was there. [R. p. 427.] With me or with somebody else from the firm. The understanding that I had was that everything at Casmalia would go unless Richfield felt it didn't bring enough money and then they would split it up and sell it piecemeal. As to the nature of the equipment that was to be sold, I don't remember too much about it, but I had it

fixed in my own mind that there was a refinery deal at Casmalia to be sold and the only way we could determine as to what would be sold would be to go up there and inspect it. I figured that the 900 tons of pipelines were parts of the refinery and interconnecting lines between tanks leading to the refinery or in the refinery. I didn't assume there was anything on the lease but a refinery at the time. [R. p. 428.] I don't remember the term exactly being used of "surface equipment". It might have been used at some time or other but I wouldn't say that I recall it exactly being used as "surface equipment". [R. p. 429.]

As to how long after my conversation with Mr. McGahan I made this report to Mr. Ferer, possibly the same night or same evening. I believe, to the best of my recollection, that I told him that "This Richfield deal is coming up pretty quick now", and that, if he were interested in the thing, he had better go up and take a look at it. As to whether or not I had said too much about details on it, I don't recall. [R. p. 432.] Wherein he said: "Mr. Ferer about so many tons of pipe up there and so many tons of steel. I think I told him the estimate Richfield had was, roughly, 1,500 tons, of which 900 tons was pipe and 600 tons was steel, which will have to be looked at pretty quick because they will be asking for a bid on it in the near future, in a week or two weeks from now." [R. p. 434.] My conversation with Mr. Ferer took place before that bid. I recall a conversation with Mr. Ferer in which I suggested the price which Aaron Ferer & Sons should bid in making its bid to, Richfield Oil Corporation for this equipment. I believe that did happen. I mean after the second conversation with Mr. McGahan,

when I came into the office and submitted that little report to Mr. Ferer. [R. p. 435.] I don't remember whether there was any subsequent conversation after that or not. It took place before Ferer & Sons submitted a bid to Richfield, as far as I recall it. Well, I didn't suggest to Mr. Ferer that he bid anything on the property but I told him that, if he is interested in buying that property, he would have to bid somewhere in the amount of \$20,000.00. The tonnage I had in mind was, well, this 1,500 tons, roughly. [R. p. 436.]

DAVID ZEIDENFELD.

*Cross-Examination*

By Mr. Krasne:

I had never seen the property that Richfield proposed to sell. [R. p. 437.] This \$20,000 figure that is being used is nothing more than what I had picked up in going around to different people who might have been bidding on it or I might have picked it up from some person at Richfield or some other place as a figure that Richfield will take for the material; that, otherwise, if they don't receive that, they will cut it up into piecemeal lots and sell it that way. [R. p. 438.] I wouldn't swear to it under oath but I believe that I did mention to Mr. Ferer about \$20,000 might take the deal on a lump sum basis or else they will cut it up into smaller lots and sell it piecemeal. When Mr. Paradise asked me if I had the 1,500 tons of material in mind when I suggested to Mr. Ferer that he would have to bid \$20,000 on this deal. I did not mean that, because I thought there were 1,500 tons of material there, the bid should be in the sum of \$20,000. [R. p. 439.] I did have authority on making deals where there might have been 10 or 15 tons or 20 tons involved on a

lump sum basis but, when it came to a pretty good sized deal, Mr. Ferer handled it personally. If a deal contemplated not only the purchase of the material, but the dismantling of it and the transporting of it and the estimating of the cost of those various items, I had no authority to make such purchases for Aaron Ferer & Sons. [R. p. 440.] In my few discussions with Mr. McGahan, they were such short periods of discussion on this that I don't recall any time that "surface equipment" in itself was actually used. [R. p. 441.] The words "surface equipment" I recall were never used to me and all I was told was that there was a refinery deal for sale up north. [R. p. 442.] The second conversation with Mr. McGahan, was the occasion, when reference was made to Mr. McGahan's estimate of 1,500 tons of material. At the conclusion of this second conversation it was my understanding that Mr. McGahan was still referring to a refinery that was to be sold. Referring to the occasion of this second conversation and the pencil notations, I did not actually read the contents of those pages. [R. p. 443.] I didn't read page 1. The only thing that interested me as far as page 1 was that item of 1,500 tons that was shown to me, with a circle around it. As far as I recollect, that is all that was brought to my attention with the exception of Mr. McGahan told me that there was 900 tons and 600 tons, of which 900 tons was pipe and 600 tons was steel. I did not read page 2 on that occasion. My answer would be the same for the whole set-up that you have there with the exception of that one page, a little bit on page 7, with reference to a few pumps. [R. p. 44.] On that day that I had this conversation with Mr. McGahan, Mr. McGahan told me that they wanted to sell everything up—I believe he might have mentioned the word "Casmalia"



at that time but he said they wanted to sell the whole refinery up there complete. He told me that they would be ready to accept bids possibly in two or three weeks on this deal and it might be a pretty good idea to go up there and see what it was all about because I might have to make a few more trips after the first trip. [R. p. 445.] After the first conversation that I had with Mr. McGahan, I had a conversation with Mr. Ferer about this matter, the same evening or within a day or so after this discussion with Mr. McGahan in Mr. Ferer's office. As far as I can recall, I told Mr. Ferer that there was a deal coming up at Richfield. And Mr. Ferer told me, "Well, are they ready to shoot on the deal because we don't want to make any good chase?" And I says, "I don't think it will really be a deal for a little while yet. It is just in real preliminary discussions". And he says, "Well, let me know when it comes up," and that was the end of it. That was all that was said during that first discussion. [R. p. 446.] The next time I discussed it with Mr. Ferer, was after my second talk with Mr. McGahan. [R. p. 447.] I do remember mentioning something to Mr. Morris Ferer about having a second conversation with McGahan. I can't be too specific as to exactly what I told him because right after that I was shunted out of the whole deal and there was nothing asked of me because he and Mr. Clements had gone in on sort of a partnership arrangement on it. [R. p. 448.] I remember speaking to him about the deal but I can't be conclusive, to tell you exactly, what I might have said to him or even the substance of it. But we didn't sit down and really discuss the thing. As a matter of fact, although I have been asked about discussions which I may have had with Mr. Ferer about this subject matter, it is true

that all I ever did was to just casually refer to this deal to Mr. Ferer. I never did sit down and talk to him about any of the details of the deal. I did not know that Mr. Ferer was going up to look at the Casmalia property before he made a trip. I don't recall having anything much to do with that deal after he made the trip. [R. p. 449.] After I had had these preliminary discussions, the two discussions with Mr. McGahan, I did not carry on any negotiations for the purchase by Aaron Ferer & Sons of the Casmalia property from Richfield. I don't think Mr. McGahan never mentioned the sum of \$20,000.00 to me. [R. p. 450.] I spoke to Mr. McGahan concerning this deal, as to what it will take to buy it, and Mr. McGahan wouldn't give me any information. [R. p. 451.] I will say this, that Mr. McGahan didn't give me any actual information of \$20,000.00; that as far as that figure is concerned I took it on myself, I will put it, to say that that will be the amount that will buy the deal from my discussions with Mr. McGahan, although he didn't give me the exact amount. [R. p. 452.] I recall that then I asked him whether any one of the several different figures would get the deal and that McGahan declined to answer but I thought he smiled when I mentioned the figure of \$20,000.00. It is vague in my mind whether he used that "producing equipment", expression or not. [R. p. 453.] There was one other occasion when I reported to my employer about a prospective deal on which I was personally not intending to bid but which I considered my employer might like to investigate to see whether a bid would be submitted. That was a deal on some cranes that the U. S. Engineering Department had for sale, and Mr. Ferer took that up by himself. [R. p. 455.]

R. D. MONTGOMERY.

*Direct Examination*

By Mr. Paradise:

I am now connected with the Richfield Oil Corporation. I am manager of the Production department. The functions of the production department are drilling and producing oil wells. I first went into the oil fields in 1911 as a workman. I was in the mining business, which I had previously studied at the University of California. While I was employed by the Standard Oil Company, that was in connection with the production and operation of oil wells. [R. pp. 460 and 461.] Prior to the time I was employed by Richfield Oil Corporation, I was employed by the receiver of Richfield Oil Company of California. I am now employed by Richfield Oil Corporation. Prior to that, I was employed by Richfield Oil Company of California. I became connected with Richfield Oil Company of California in 1926. I am familiar with the Casmalia oil field, the property owned by Richfield Oil Corporation. The wells were drilled from 1917 to 1925, that is drilled and produced. Production stopped of those wells in 1925. [R. p. 462.] In my opinion, the field has not been depleted, fully depleted. There is production on properties adjacent to and alongside of this property that we were discussing, by the Oliver C. Fields' Casmit Oil Company. It produces from 10 wells approximately 500 barrels a day at the present time. My first examination of the Casmalia Property was in 1930. [R. p. 464.]

In the early part of 1940 the removal of the derricks and tubing and rods from the wells at Casmalia occurred. I gave instructions to the purchasing department, to Mr.

Kelly. [R. p. 465.] I gave him definite instructions not to have the casing tampered with at all. [R. p. 466.] A casing, is landed and cemented upon the completion of your drilling. at which time, after cleaning out inside of the casing, you run tubing inside, under a different hook-up entirely. The tubing is far easier to remove. I attend some of the executive meetings of Richfield, once a week. The president of the company and its executive heads are present. I do recall some discussion of the matter of the removal of the tubing or rods from the wells at Casmalia prior to the time when those items of equipment were removed. [R. p. 467.] I recommended that, if we could get an operator to take this out on a satisfactory basis, we should do so because they wouldn't use that type of structure in future operations. At the occasion of that meeting, I made recommendation that neither the tubing, the rods, nor the derricks, would be required in our proposed future type of operation, and that the property to my mind presented good opportunities for operation, profitable operation. And with that in mind I was ordered to go ahead and have this stuff removed. [R. p. 468.] There was no discussion concerning the abandonment of the wells. I recall a conversation at the executive meetings in the fall of 1940. [R. p. 469.] Mr. Kelly of the purchasing department called me up in about September, 1940, and told me that the refining group was going to sell what they called refining equipment up there, and did we wish to sell our equipment that we would not use in our future operations. And he recommended that it would be a good time to make a combination sale of this stuff. I agreed with him and that was the initial starting of this sale of equipment, of our equipment. I can't say that I mentioned to Mr.

Kelly at that time anything about the oil wells. [R. p. 470.] At these so-called executive meetings, I proposed to sell this surface or production equipment. [R. p. 471.] I mentioned about the pipelines. Part of that could have been used, possibly some of the pipe. It was not adaptable for my plans at all. I described to the management at that time the nature of my proposed operation. [R. p. 472.] I gave instructions in connection with a sale concerning the six large storage tanks on the property. [R. p. 473.] I gave those instructions to either Mr. Kelly or Mr. Davis. I generally talked to Mr. Kelly, but I might have talked to Mr. Davis. At the time of this contract with Aaron Ferer & Sons, I had in my possession copies of the logs and histories of the wells. [R. p. 474.] It was never my intention at any time during the negotiation of this contract with Aaron Ferer & Sons and up to and including the date of the execution of that contract, on or about January 17, 1941, that the wells be abandoned, any of the oil wells on the property, or that any of the casing be removed from those wells. Mr. Kelly asked my approval of that contract prior to the execution of it. I always approve those types of contracts or look them over for approval. I would not have approved that contract had there been any provision in the contract for the abandonment of the wells or the removal of any of the casing from the wells. [R. p. 475.] By the removal of casing from a well in connection with the abandonment thereof there is some risk or danger that damage may be done to wells in an adjoining field. [R. p. 478.]

*Cross-Examination*

By Mr. Sturzenacker :

I know that this contract provides that in wrecking the equipment or in removing the refining and production equipment sold to Aaron Ferer & Sons under this contract, he agreed to remove it in accordance with the various laws and rules and regulations. I saw that in the contract. [R. p. 479.] That contract was read by me and approved by me before it was signed, that is, by our people. I had laid down to the man that negotiated the contract the sale of this stuff the type of equipment in so far as the production department was concerned and in so far as I was authorized from my management as to the type of equipment that was to be sold. [R. p. 480.] The tubing that was in these wells at Casmalia prior to the time that Mr. Anderson removed it [R. p. 481] was Lapweld tubing, a very obsolete old fashioned type of tubing, according to the records of the Pan American, and that is what we bought from the Pan American. I authorized that contract between the Richfield Oil Corporation and W. R. Anderson. In reference to lapweld casing, that could have been casing. There is such a piece of equipment in the oil business as  $4\frac{3}{4}$  inch lapweld casing and that same descriptive equipment could be used for tubing. [R. p. 482.] We pulled out this tubing or this casing that was used as tubing because we thought it was corroding. [R. p. 483.] Some of the tanks had oil in them and some of them had what is called tank bottoms in them. [R. p. 484.] This field was acquired in 1929 and we were thinking of operating it in 1930 but we went into receivership in 1931 and we stood dormant for six or seven and couldn't do anything. [R. p. 485.]

Since Richfield has owned this property, we have made a constant study of this problem and of reopening the field we have made reports on it and we have brought our management up to the field. Outside of studying and giving reports to our officials, cleaning up this debtirs around here I would call a start in the operations of our proposed work. [R. p. 486.] We had existing surface leases on that property and we had to protect the cattle from falling into sump holes. That has nothing to do with the operations of the field, I grant you. I believe that surface lease for the running of cattle had been in existence for several years. [R. p. 487.] We have re-leased the property for that same purpose for another five years, for farming beans. [R. p. 488.] The map is here and I see no marks around those wells. From a first glance, I see no dots on this map that represent the surface locations of wells, certainly. [R. p. 489.] We exempted an oil house or office and a garage, or whatever it was. Those log books are not in my possession. I wouldn't have sold them if I had known they were up there. [R. p. 491.] Casing, Your Honor, is a broad term. Some people would consider it producing equipment and some people call it subsurface equipment. It is certainly used in the production of the well and it is used to keep the formations from caving in. It is called generally subsurface equipment. There is that general distinction between the term "producing equipment" and the casing that is installed in well. [R. p. 492.]

*Redirect Examination.*

I did not understand that that contract covered any subsurface equipment at the time I approved it. [R. p. 494.]

MORRIS FERER.

*Direct Examination.*

The firm of Aaron Ferer & Sons is a co-partnership. I am in charge of the operation of the business. Our firm was associated with my father. We have been in business over 50 years. Mr. Zeidenfeld was a buyer of scrap material or scrap metals and scrap iron. He contacted mostly small scrap dealers and auto wreckers, generally, he did buying of smaller lots of material. He bought on the basis of the market price of the general market for all grades of scrap material, a fixed price that changed from time to time. He did not have any authority to negotiate for us on any deals that involved dismantling of materials and transportation. He had no authority on any lump sum deals that would amount to any type of figure. He might take a small deal that would amount to a few hundred dollars or something like that and consult with me on it but he had no authority to go into any type of large deal, whether it was a lump sum or anything else, without first getting proper authority. [R. pp. 499-500.] In this Casmalia deal a very large amount of money was involved. I first heard that there was to be some equipment sold at Casmalia when Mr. Clements came to me with the proposition which I place as sometime in the latter part of November. [R. p. 501.] He mentioned to me the type of deal it was and I told him that I was very much interested. He mentioned that he didn't have enough funds to handle a deal of that character; that, if we got the deal, I would finance it and we would split it or he would take a portion of the profits if there were any. [R. p. 502.] Prior to the date of this conversation with Mr. Clements, Mr. Zeidenfeld had not



said anything to me about this deal. [R. p. 503.] I do not recall him ever speaking to me about this particular deal. [R. p. 504.] Prior to the time that I made the deal with Richfield, no one working for Richfield had said anything to me about their estimate of quantity of material on the job. [R. p. 505.] I estimated there were approximately 3,000 to 6,000 tons. If I had estimated that there would be only 1,500 tons of material, I would not have made the same offer. The largest portion of the pipe when it was removed was in good condition, some of it was scrap. [R. p. 507.] The largest portion that was good pipe we sold to various pipe people that use it and resell it for pipe mostly in the oil business. In my opinion, the pipe was good enough to be used for that purpose, as pipe. We sold quite a large number of the tanks to the State of California. [R. p. 508.] If the material and equipment had been in the condition as described by Mr. Montgomery, that would have been considered scrap and it would have had a market for remelting purposes as scrap iron. The established market price for scrap iron in January 1941 was approximately \$12 a ton f. o. b. [R. p. 509.] My testimony is that my overall estimate was from 3,000 to 6,000 tons of material in this Cas-malia deal. [R. p. 515.] 1,100 tons of material removed by us has been sold. No one connected with Richfield ever told me that the defendant Richfield desired to sell only service equipment. [R. p. 517.] I remember the occasion of a meeting between me, Mr. Davis, Mr. Clements, Mr. McGahan and Mr. Paradise, in Mr. Paradise's office. It was a few days after I was at Richfield's office and gave them a check for \$22,000 in payment of this deal. Before I went into this meeting at Mr. Paradise's office I brought Mr. Davis the check. He then handed me

a piece of paper outlining the nucleus of the deal and he contacted Mr. Paradise, who apparently was busy and couldn't see us at that time and told us to come back and that we were to go up and draw up the final or formal contract. I did not understand, after I had made my offer in writing and had received Richfield's offer in writing and after you had paid Richfield the \$22,000, that there were to be further negotiations in connection with the deal. I took it for granted that we had already made a deal. [R. p. 518.] Plaintiff's Exhibit No. 2 was the offer that I had submitted to Richfield. [R. p. 519.] Plaintiff's Exhibit No. 3 was that acceptance that I had received from Richfield. Plaintiff's Exhibit No. 1 was the memorandum of reply which Mr. Davis gave me when I handed him the \$22,000 on January 8th. [R. p. 520.]

*Cross-Examination*

By Mr. Paradise:

Mr. Zeidenfeld did not tell me that it would take about \$20,000, in the neighborhood of \$20,000, to make an acceptable bid. He did not ever mention a sum in connection with this. I don't remember ever discussing this transaction with Mr. Zeidenfeld. [R. p. 521.] All of his reports were very oral. I have no knowledge of the equipment that is used in an oil field for operating purposes. I have experience as far as pipe is concerned and that any other oil company could easily use that pipe, for the function that pipe would be used for. [R. p. 522.] I am talking about the pipe after it had been taken out, which was in good condition to be re-used as it was taken out of the ground. It seems that the oil preserved the pipe because a great deal of it was just as good, in my opinion, as the day it came from the factory. [R. p. 523.]

I estimated in the deposition that, if the casing totaled some 50,000 feet, that casing would weigh approximately 2,000 tons, approximately 8 pounds to the foot. [R. p. 524.] I remember a visit to Mr. Kelly's office. I remember stating we had a very substantial loss on this deal and we discussed the wells at the time, and I told them at that conversation or at that meeting that we definitely anticipated getting the pipe out of those wells and that we would have a terrific loss if we didn't get what we expected to buy. We did encounter additional expense due to rainy weather and I mentioned that. [R. p. 527.] At that meeting which occurred, a few days subsequent to the giving of the check, there were discussions but the discussions were mainly as to when we were going to get started. There was one discussion there on the material which you had sold to our contract. [R. p. 529.] No contract had been drawn at that time. It is true that at that meeting the only documents that were before those who were discussing the transaction were this memorandum of January 8th, which is Plaintiff's Exhibit No. 1, and Aaron Ferer's offer of December 10th, which is Plaintiff's Exhibit No. 2, and Richfield's letter of January 2nd, which is Plaintiff's Exhibit No. 3, but I don't even know that those were before us at that time. [R. p. 530.] It was on that occasion of that conversation that I asked for the inclusion of the words "metal and lumber". I think there was some discussion about exclusion of the gas line or lines running from the superintendent's house to one or more of the wells. A gas line to a superintendent's house just didn't mean anything and I didn't give it any thought. [R. p. 531.] That hadn't been discussed in any prior meetings between me and Mr. Davis or Mr. McGahan. As to the matter of our insurance

coverage as a contractor, I think I brought that up myself. That is a very common thing in a deal of this kind. I think I made arrangements the minute I got your letter of January 2nd without insurance company to start making the proper and necessary arrangements for the men that were away on this job. But I do know, immediately the minute we got your acceptance, we had a deal, that had not been discussed prior to the meeting in your office. But it is a natural thing. We wouldn't lay ourselves open to any damages on the part of our own people suing us for work that has to be done. [R. p. 532.] The contract contains a provision concerning the protection by me of the property against mechanics' liens. I think it was just put in the contract and I took it for granted as a natural form of your method of doing business. [R. p. 533.] The memorandum that Mr. Davis gave me on January 8th was not merely a nucleus or the basis on which the contract would be drawn, it was a memorandum, in my opinion, and what I thought when I handed him my money was that it was the basis or the fundamentals of this deal and that the other things were just formal things, such as insurance and such as laws you were talking about and various other things that are just natural. [R. p. 534.] There were no matters of negotiation of importance with reference to this deal. [R. p. 535.]

*Redirect Examination*

By Mr. Krasne:

There were a number of things that Richfield asked me for, after I thought the deal had been set and I let them have. [R. p. 537.] In other words, I mean, after a deal is set, there is sometimes a little give and take, that is what happened in this deal. [R. p. 538.]

THOMAS HUBBARD CLEMENTS.

*Direct Examination*

By Mr. Sturzenacker:

I run the Refinery Equipment Company. It has run for eight years. I took a one-year course in oil production and technology, under Professor Uren, at the University of California, at Berkeley. During the time I have been engaged in the selling of equipment, I have sold production equipment. [R. p. 539.] I originally heard of this transaction, as far back as 1938 I contacted Richfield, or in 1937 possibly, to see if we could get some or all of this equipment out here. I contacted their local storekeeper, Mr. McGahan, once or twice away back. In the latter part of 1940 I was working with Mr. Davis [R. p. 540.] Mr. McGahan never told me at any time in any conversation that the Richfield Oil Company desired to sell their surface equipment at Casmalia. [R. p. 541.] I saw part of the stuff that Mr. Anderson was removing. He was pulling production strings and removing such things as crown blocks and certain steam pumps and stuff. [R. p. 542.] In my business of selling equipment, I sell pipe. This pipe that Mr. Anderson was removing was in excellent condition. In my opinion this pipe was removing usable for use for tubing in oil wells in Southern California. I am quite familiar with this Casmalia property, and the kind of tubing that is in that field and the adjacent properties operating from the same oil pool. The equipment that is being used by other operators is the same class of stuff that was used at the Richfield lease. Such operations are still being carried right across the wash or draw O. C. Fields is still operating that old Associated lease. I was in charge of the

removal of the equipment there. [R. p. 544.] We folks started to work up there, and after I got the ground cleared, we proceeded to call in two or three contractors who specialized in well pulling. [R. p. 547.] We consulted with two or three. We made a contract with Mr. Owens of Long Beach to pull one well as a test. It was in the summer of 1941. Up to that time no one in Richfield had ever told us that the casing in the wells wasn't to go on this deal. [R. p. 548.] I recall during 1940, of having several consultations or conversations with Mr. Davis relative to the purchase of this Casmalia property. Under date of September 25th, I wrote Mr. Davis a letter. It refers to the purchase of the equipment at Casmalia. [R. p. 556.] He wouldn't let me bid on the whole thing. As a matter of fact, he said, if I would bid on these particular items which I needed particularly, that he would take it up with the management and see if he could effect their disposal. He told me he would keep me advised. He did notify me finally, about the middle of November. [R. p. 557.] I was in his office many times. That was prior to the time that Mr. Ferer and I went in with a check on the 8th day of January, 1941. I purchased two plants in the year or year and a half prior to that from him, from Richfield. Those negotiations carried on with him personally in his office. I got in touch with Mr. Ferer. [R. p. 558.] That was in the early part of December. Prior to the time we went to the property he told me that the property was ready to be sold. [R. p. 559.]

*Cross-Examination*

By Mr. Paradise:

I have an interest in this transaction. It is predicated on one-third of the net returns from the transaction. [R. p. 561.] I did not have any conversations with Mr. McGahan during November or December of 1940, in connection with this proposed purchase of salvage equipment at Casmalia. [R. p. 563.] I know what casing is in an oil well. The casing differs from the tubing or production string generally in size and also as to its usage. As a rule it is installed in a well differently. As a rule, it is cemented in on the bottom edges to the formation. There are cases, however, in which it is put in with a temporary packer. [R. p. 566.] It is installed in the same manner as tubing or the production string. I think any of the pipe used in the performance of a well is production equipment. [R. p. 567.] My estimate of the tonnage of the recoverable casing from the wells on the property, well, we always assumed there would be a minimum of 1,000 tons and upward. [R. p. 568.] As a matter of practical operation casing could be taken or removed from a well without abandonment. [R. p. 571.] I am familiar with statutory requirements in California concerning the removal of any casing, any part of casing, from a well located in California. [R. p. 572.] Any removal of casing as well production strings has to be so reported to the State continuously. When I used the expression "any part of a production string" I meant thereby any part of the casing in an oil well. [R. p. 574.] I went to the Santa Barbara office of the supervisor of that territory and found the Richfield had not—I made an inquiry of the Division of Oil and Gas concerning their abandon-

ment requirements at a time prior to the date of the execution of this contract. [R. p. 575.] I did make an inquiry of the Division prior to January 17, 1941. I went to that office, the Santa Barbara office, the original office for that territory was in Santa Barbara. I talked to the assistant in charge [R. p. 576], about abandonment of the wells at Casmalia. [R. p. 577.] When we visited the property I was telling Mr. Ferer I had seen eight wells pulled on the same strata on adjacent property and out of the eight wells six of the casings that came out were perfect and two of them were in bad condition due to corrosion from hydrogen sulphide. I didn't tell him anything about my gas wells. [R. p. 582.] I did not discuss with Mr. Ferer, the abandonment or nonabandonment of wells from which gas was flowing. I discussed it with him on the date of the signing of the contract in your office, when the point was raised on the blueprint of the retention of two or three of these wells for gas purposes. There was a discussion of the retention of wells at that date in my office. The discussion lay between Ferer and myself and not between us and the Richfield. We went to the corner of the room and held a huddle when it came to that point and were discussing it. [R. p. 583.] It was a private conversation. At that time you presented to us a map for our inspection, showing exemptions which we hadn't been informed of before. [R. p. 584.] That was what prompted our private conversation. [R. p. 585.] I would say at least 50 per cent of the pipe which we removed was above the ground. Valves and fittings that are attached to pipelines might be either screwed or flanged. [R. p. 586.] We examined the pipelines as far as we could see. When we examined



all of the pipe, we found it good on the exterior and we subsequently found it good on the interior. [R. p. 587.] I would say we had 10 per cent wastage. The rest was all usable. We did not recondition the pipe before selling it. The refinery went ahead and used it. [R. p. 590.] If that was true, that it was 1100 tons that was removed, I would say that would be 80 per cent of the pipe. [R. p. 593.] The Kelly Pipe Company rejected a lot because it didn't conform to standard specifications of pipe. [R. p. 594.] Some pipe was rejected because they said it was inferior and some of it was rejected because it was what is called bastard sizes. [R. p. 595.] The casing I was talking about recovering there would be reused and resold as pipe, and that which was not usable as pipe would be sold for culverts. At the time I went to Santa Barbara the first time to talk to the Division of Oil and Gas about abandoning these wells, they told me the whole thing was up to the manager of the Division; that I would have to come back here again and see him. [R. p. 598.] Instead of going back the third time, we sent either two or three well-pullers in there to get the specific instructions. Even at the present time I have never received instructions from the supervisor in that district as to what is going to be necessary to abandon those wells. [R. p. 599.] When I referred to recoverable casing that would be in those wells after Mr. Anderson had finished and we could take out I term recoverable casing. [R. p. 600.] The only meaning, common, ordinary meaning, in the oil industry, that is to say, the portion that can be taken out and still qualify with the requirements of the Division of Oil and Gas. [R. p. 601.]

MORRIS FERER.

*Cross-Examination*

By Mr. Paradise:

It is true that I have testified in this case that you did not know to how many wells the excluded gas line ran. [R. p. 603.] I told you that I knew nothing about the mechanics of gas wells or any other kinds of wells. [R. p. 604.]

No. 10743.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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AARON FERER & SONS, a copartnership,

*Appellant,*

*vs.*

RICHFIELD OIL CORPORATION, a corporation,

*Appellee.*

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BRIEF FOR APPELLEE.

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FILED

FEB 16 1945

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No. 10743.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

AARON FERER & SONS, a copartnership,

*Appellant,*

*vs.*

RICHFIELD OIL CORPORATION, a corporation,

*Appellee.*

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## BRIEF FOR APPELLEE.

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### Statement of the Case.

This is an appeal from a judgment by the United States District Court for the Southern District of California, Central Division, which ordered that appellant take nothing by its action and that, as prayed in appellee's counterclaims, the written contract between appellant and appellee be reformed in the manner therein provided [Vol. I, pp. 157 and 158]. The jurisdiction of the court below depended upon diversity of citizenship, the action having been removed from the Superior Court of the State of California. 28 U. S. C. A., Secs. 71 and 72 (Judicial Code, Secs. 28 and 29) [Vol. I, pp. 7-18].

The action was brought upon a written contract between the parties dated January 17, 1941. By its first cause of action, appellant sought declaratory relief and specific performance by way of injunction; and by its second cause of action, appellant sought damages for the alleged breach of the contract [Vol. I, pp. 19-25]. The contract, a copy of which was attached as an exhibit to the amended complaint [Vol. I, pp. 26-34], provided for the sale by appellee to appellant of certain equipment and facilities located on land owned by appellee near Casmalia, in Santa Barbara County. As consideration, appellant paid appellee the sum of \$22,000.00, and appellant agreed to perform certain work at its own cost, which included among other things, "the dismantling, removal and disposition of all equipment and facilities to be purchased by Buyer" thereunder. Subsequent to the execution of the contract, appellant asserted the right thereunder to remove the casing from the oil wells at Casmalia and to abandon such wells. Appellee notified appellant that the contract did not cover or relate to the casing in the wells and that appellee would not consent to appellant's removal of any thereof [Vol. I, pp. 51-54]; and this action was then commenced.

After a hearing on appellee's motion to dismiss, the court below sustained the same as to the first count of the amended complaint on the ground that the contract was for the sale and delivery of personal property and that under the circumstances, appellant was not entitled to declaratory or equitable relief [Vol. I, pp. 35-41]. Appellant assigns as error here such action by the court below in so far as it denied appellant declaratory relief.

After the ruling on the motion to dismiss, appellee filed its answer denying that the subject matter of the contract

included any of the casing installed in any of the oil wells, and asserting that the subject matter was limited to the surface facilities located on the land, which denial raised the issue of the proper interpretation of the contract; and by separate defenses, appellee sought by counterclaim to reform the contract to limit the subject matter thereof to the surface equipment and to provide for an express exclusion of the casing in the wells. By separate counts, reformation was sought first, on the ground of mutual mistake, and second, on the ground of a mistake on the part of appellee which was known or suspected by appellant [Vol. I, pp. 41-54].

Subsequently, appellant made its motion for summary judgment [Vol. I, pp. 55-70], which motion was thereafter heard by the court below on the affidavit of Morris Ferer, one of the copartners of appellant [Vol. I, pp. 59-65], and upon the affidavits of F. I. McGahan, H. H. Kelly and Harold Davis, employees of appellee [Vol. I, pp. 83-98], and upon the depositions taken by appellee of Morris Ferer, David Zeidenfeld, a former employee of appellant, and T. H. Clements, who had a one-third interest in appellant's profits and losses under the contract [Vol. II, pp. 616-939]. Appellee also made a motion for summary judgment in its favor on the two counts for reformation contained in appellee's counterclaim, which motion was based upon the same affidavits and depositions [Vol. I, pp. 107-110]. Thereafter, the court below made its order denying the appellant's motion for summary judgment [Vol. I, p. 112]. The court below also made an order denying appellee's motion for summary judgment; but in so doing, the court expressly stated that relief was denied upon the sole ground that issues of fact

had been raised [Vol. I, pp. 113 and 114]. On this appeal, appellant cites as further error the denial of appellant's motion for summary judgment.

The court then set the case for trial on the merits, with an order admitting in evidence at the trial, the affidavits and depositions theretofore considered on the motions for summary judgment [Vol. I, pp. 113 and 114].<sup>1</sup> The case was tried upon two issues, first, the issue of interpretation of the contract as raised by the complaint and answer thereto; and second, the issue of reformation as raised by appellee's counterclaim and appellant's reply thereto [Vol. I, pp. 175-183 and p. 253; Vol. II, p. 496].<sup>2</sup>

The court thereafter made its decree reforming the contract to exclude expressly the casing in the wells from its subject matter [Vol. I, pp. 157 and 158]. In so doing, the court left undetermined the issue of the interpretation of the contract.<sup>3</sup>

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<sup>1</sup>The order admitting the affidavits and depositions in evidence made the affiants and deponents subject to cross-examination and reserved proper objections to questions in the depositions. At the trial such order was modified to the extent that Zeidenfeld's deposition was not admitted as testimony, although it was nevertheless used for impeachment purposes [Vol. I, p. 144].

<sup>2</sup>At the conclusion of the presentation of testimony, the court requested that the two issues be briefed separately, *i. e.*, that appellant originally brief the issue raised by the complaint and that appellee originally brief the affirmative issues raised by the answer [Vol. II, pp. 610-612].

<sup>3</sup>"Finding No. 30. In view of the foregoing findings, it is unnecessary to make any finding concerning the proper construction or interpretation of said written contract dated January 17, 1941, either on its face or in the light of the surrounding circumstances" [Vol. I, p. 154].

### Statement of Facts.

The land at Casmalia had been owned by appellee, Richfield Oil Corporation, and its predecessors, for a considerable number of years. At the time of the contract between the parties, there were various oil wells on the Casmalia property which had been drilled subsequent to 1917 and had produced oil until 1925, when production was discontinued because of unprofitable operations. At the time production was discontinued, the field had not been fully depleted, had several million barrels of oil in it, and at the time of trial, adjacent properties were still being produced at the rate of 500 barrels per day. [Vol. I, pp. 462-464, and Vol. II, p. 473.]

Since one of the principal issues for determination at the trial was the intention of Richfield concerning the exclusion from the sales contract of the casing in such wells, it is pertinent, before discussing the negotiations between the parties leading up to the contract, to state briefly the actions taken by Richfield and its predecessors with respect to the Casmalia property prior to the negotiations. Commencing in 1929, the management of Richfield and of its predecessor companies had made a constant study of the problem of reopening the field for the production of oil; reports had been made upon the problem; the management had visited the field with the thought of opening up not only the Casmalia field, but also adjacent fields in the vicinity; and recommendations that the property presented good opportunities for profitable operation had been made in 1940 by Mr. Montgomery, the manager of Richfield's Production Department, to the regular executive meetings of the Richfield management. He advised the management that the reasons for the unprofitable

operations in 1925 which had caused the property to be shut in were the use of old, obsolete pumping equipment and the use of steam for pumping purposes; that the oil was very heavy and was produced by the injection of distillate in the wells and the oil was then driven down to a great mass of refining equipment where the distillate was distilled off; and the refining equipment was also used to break the viscosity of the oil in order to get it into a pipeline. In his recommendations, Montgomery proposed a new method of operation which would decrease operating costs and which would use gas engines or pumping jacks to eliminate the use of steam. [Vol. I, pp. 330-348, and Vol. I, p. 463, to Vol. II, p. 487.]

Early in 1940, after the matter had been recommended at one of the executive meetings, Montgomery instructed Mr. Kelly, the manager of Richfield's Purchasing Department, to obtain a contractor to remove the derricks, tubing and rods from the wells. The reasons for such removal were that the derricks, having been there for many years, were toppling over and were in a hazardous condition, and would not be used in the future plan of operation, and Richfield felt that the rods and tubing in the wells were in a precarious condition because of the corrosive oil and water in the wells and that the rods and tubing might damage the wells. Montgomery instructed Kelly that the casing in the wells was not to be tampered with at all and that if the contractor found any tubing parted or stuck in the hole, he was not to "fish" it out in order that the casing might not be disturbed [Vol. II, pp. 465-467]. These instructions culminated in the so-called Anderson contract dated March 12, 1940 [Defendant's Exhibit A, Vol. I, pp. 265-278]. Paragraph 4 of the Anderson con-



tract sets forth the work to be performed by the contractor in the removal of the derricks, tubing and rods and contains provision for protection of the wells and the duty on the contractor's part not to remove any of the casing. In Anderson's work under such contract, the wells were not abandoned and the casing was left therein and the wells were each capped at the surface in order that they might in the future be reopened and re-entered for the production of oil [Vol. I, p. 91].

During the summer of 1940, Richfield decided at one of the executive meetings to make a combination sale of refinery and production equipment at Casmalia [Vol. II, pp. 470 and 471]; and Kelly was instructed to sell the surface equipment [Vol. I, pp. 340 and 341]. This decision was made after Montgomery advised the management that the surface or production equipment, including the pipelines and boilers, had been there for many years and had probably deteriorated and would not be required in the proposed scheme of future operations [Vol. II, pp. 469-479]. The matter of arranging for the proposed sale was delegated by Richfield's Production and Purchasing Departments to Mr. McGahan, Richfield's supervisor of storehouses, and to Mr. Davis, one of the buyers in Richfield's Purchasing Department. McGahan's duties included the notification of prospective bidders when Richfield determined to sell any of Richfield's old or salvage equipment [Vol. I, p. 83]. His instructions from the Purchasing and Production Departments were that the surface equipment at Casmalia, with certain exceptions, was to be sold and that he was to take prospective bidders to Casmalia and show them the equipment [Vol. I, pp. 375-377]. Davis' duties included arranging preliminary

negotiations for the sale by Richfield of salvage equipment [Vol. I, p. 93]. His instructions from Mr. Kelly were to make arrangements to sell the surface equipment at Casmalia [Vol. I, pp. 258-9, and p. 283].

Thereafter, negotiations between various representatives of appellant and Richfield occurred over a period of weeks until execution of the written contract on January 17, 1941. These negotiations consisted of various conversations between Messrs. Ferer, Clements and Zeidenfeld, representing appellant, and Messrs. McGahan, Davis and Kelly, representing Richfield.

McGahan had two conversations with Zeidenfeld, who had on various prior occasions discussed with McGahan the purchase by appellant of salvage equipment belonging to Richfield. At the first conversation McGahan told Zeidenfeld that Richfield was planning on taking bids for the sale of "surface equipment" located at Richfield's Casmalia property; that he did not have specific information at that time as to what items of equipment were located on the property; and he inquired of Zeidenfeld whether appellant would be interested in submitting a bid [Vol. I, pp. 83 and 381 and 382]. At a second meeting with Zeidenfeld during the last week of November or the first week of December, McGahan informed him that he had more specific information concerning the available equipment and he showed Zeidenfeld penciled memoranda and estimates [Defendant's Exhibit B, Vol. I, pp. 387-397]. They discussed the items on the memoranda and McGahan informed Zeidenfeld that his estimate of the over-all ton-

nage of the equipment to be sold was 1500 tons, which consisted of 920 tons of pipelines and 580 tons of other surface equipment including boilers, pumps, valves, fittings and refinery equipment [Vol. I, pp. 85 and 383-386]. During the interval between McGahan's two conversations with Zeidenfeld, McGahan had a conversation with Morris Ferer; and in reply to Ferer's inquiry as to what Richfield had for sale at Casmalia, McGahan told him that the equipment to be sold was "surface equipment" which generally included tanks, boilers, pipelines, valves and fittings, and that he had no specific inventory of the equipment at that time, but would have a better idea after he had made an investigation of the property. He told Ferer that he would be glad to meet him at the Casmalia property and show him what equipment was available for sale [Vol. I, pp. 84 and 380 and 381].

Prior to January 17, 1941, McGahan had two or three conversations with Clements concerning the sale and at one of them, he told him that the "surface equipment," with certain exceptions, would be sold [Vol. I, pp. 97 and 98; 381-383].

During December, 1940, Ferer and Clements made a trip to Casmalia and made a personal investigation of the equipment there. Subsequently, appellant submitted its bid to Richfield by letter dated December 10, 1940 [Plaintiff's Exhibit 2, Vol. I, pp. 215 and 216]. Appellant's bid was accepted by letter of Richfield to appellant dated January 2, 1941 [Plaintiff's Exhibit 3, Vol. I, pp. 218 and 219]. Subsequently, on January 8, Messrs. Ferer and

Clements met with Davis in the latter's office, at which time appellant's check for \$22,000.00 was delivered to Davis, and during which meeting a memorandum was prepared by Davis [Plaintiff's Exhibit 1, Vol. I, pp. 220 and 221]. At that meeting, additional terms of the arrangement were discussed and agreed to [Vol. I, pp. 226-234, and p. 309]. During the same conversation, they discussed the six large storage tanks at Casmalia (two of which had capacities of 55,000 barrels each) which were excluded from the sale; and Clements asked Davis why Richfield did not sell the tanks as a part of the transaction. In the presence of Clements and Ferer, Davis called Montgomery on the telephone and discussed the matter with him; and at the conclusion of the conversation, Davis told Ferer and Clements that the tanks were not to be sold because the Production Department wanted to retain them for storage purposes in the event the wells were reopened [Vol. I, pp. 251 and 252; 285 and 286; and Vol. II, pp. 473 and 474].

At the conclusion of the conversation in Davis' office, Davis telephoned Mr. Paradise, one of the attorneys for Richfield, and a meeting was then held in the latter's office for the purpose of discussing the preparation of a written contract. Messrs. Ferer, Clements, Davis, McGahan and Paradise attended the meeting. At that meeting, the exclusion of the gas line was also discussed. Davis pointed out to Messrs. Ferer and Clements on a large map of the premises (a copy of which map was attached as an exhibit to the contract) the gas line from the super-

intendent's house to one of the wells on the property; and Davis told them that Richfield desired to exclude such line from the sale in order that the superintendent's house (also excluded from the sale) could continue to receive gas from such well. He also said that if there was not gas in such well sufficient to serve the superintendent's house, it might also be necessary to exclude gas lines running to other wells on the property in order to insure a gas supply to the superintendent's house. [Vol. I, pp. 88, 96, 300-302, 305-311 and 367-368]. The map attached to the contract contains the following legend printed in red at the terminus of the excluded gas line leading to Well No. 36: "And any extensions of gas line necessary to furnish gas to Duncan's house." [Vol. I, p. 149, and Vol. II, pp. 897 and 898.]

Neither the casing in the wells nor the abandonment of any of the wells was ever mentioned during any of the conversations or negotiations [Vol. I, pp. 60, 86-7, and 96].

H. H. Kelly, who executed the contract on behalf of Richfield, did not participate in any of the negotiations, and met Messrs. Ferer and Clements only on January 8, 1941, when they delivered the \$22,000.00 check to Richfield [Vol. I, p. 322].

The contract was executed on January 17, 1941, and the controversy concerning whether or not the casing in the wells was included in the subject matter of the contract did not arise until several months later.

### Summary of Argument.

(1) The court below correctly ruled that appellant was not entitled to a summary judgment.

(2) The court below correctly sustained appellee's motion to dismiss the first cause of action of the amended complaint by which appellant sought declaratory relief and specific performance.

(3) Any error by the court below in sustaining the motion to dismiss the first count of the amended complaint or in denying appellant's motion for summary judgment did not affect the substantial rights of the parties.

(4) The findings of fact of the lower court are supported by substantial evidence; the findings are sufficient to support the conclusions of law and the judgment; and the conclusions of law sustain the judgment.

(5) The proper construction and interpretation of the contract in the light of surrounding circumstances is that the subject matter thereof was limited to equipment and facilities located on the surface of the land and did not include the casing in any of the oil wells.

## ARGUMENT.

### I.

#### The Court Below Correctly Ruled That Appellant Was Not Entitled to a Summary Judgment.

The major portion of appellant's brief (pp. 17-77, inclusive) is devoted to an argument that the trial court erred in denying its motion for summary judgment. The motion was heard on the affidavits of Messrs. Ferer, McGahan, Davis and Kelly, and on the depositions of Messrs. Ferer, Clements and Zeidenfeld.

Appellant's argument largely concerns the weight to be given to the testimony of the witnesses as contained in the affidavits and depositions, and thus discloses a misunderstanding of the nature and purpose of the procedure for summary judgment. The function of the trial court upon the hearing of a motion for summary judgment is not to weigh the evidence or to try the case on its merits, but rather to determine whether there is any genuine issue as to any material fact and whether the moving party is entitled to a judgment as a matter of law. Rule 56C of the Federal Rules of Civil Procedure.

A motion for summary judgment is properly denied, and indeed must be denied if genuine and substantial issues are presented.

*Acadian Production Corporation of Louisiana v. Land*, 136 Fed. (2d) 1, C. C. A. 5, 1943. (In this case the court mentioned that no depositions or affidavits were present which made the facts clear, but that the pleadings themselves raised important issues.);

*Campana Corporation v. Harrison*, 135 Fed. (2d) 334, C. C. A. 7;

*Ramsouer v. Midland Valley Railroad Co.*, 135 Fed. (2d) 101, C. C. A. 8.

See also, *Kent v. Hanlin*, 35 Fed. Supp. 836, where the court said on page 837:

“However, a summary judgment should not be entered if the pleadings raise any genuine issue of fact material to the dispute between the parties. In other words, such a judgment is improper unless a trial would be a useless form. *Saunders v. Higgins*, D. C., 29 F. Supp. 326. Therefore, if an answer raises a material issue of fact, there is an insurmountable obstacle in the way of a summary judgment, no matter how a motion for the same may be bolstered by affidavits.”

Can it possibly be said that the pleadings, affidavits and depositions before the court showed both that there was no genuine issue as to any material fact and that appellant was entitled to a judgment as a matter of law? It seems so obvious that the burden of such a showing can not possibly be maintained by appellant that a detailed discussion of the contents of the affidavits and depositions would occupy the time of this Court unnecessarily. However, the following instances are illustrative of sharp issues of material facts which arose if full credence be given to the sole evidence offered by appellant, to-wit: the affidavit of Morris Ferer [Vol. I, pp. 58-66].

(1) Ferer's affidavit in effect said that no one at any time prior to the execution of the written contract said anything whatsoever with respect to limiting the subject



matter of the sale to equipment or facilities on the surface of the land. This was denied in McGahan's affidavits [Vol. I, pp. 83-88 and 97-98].

(2) Ferer's affidavit stated that if Richfield intended that the subject matter of the sale be limited to equipment on the surface and that the subject matter was not to include the casing in the wells, Ferer had no knowledge of such intention or any suspicion thereof whatsoever. Davis' affidavit described two separate conversations which occurred during the negotiations, either of which was sufficient to give Ferer both knowledge and suspicion of Richfield's intention:

A. The conversation between Messrs. Ferer, Clements and Davis on January 8 during which Davis explained the reason for the exclusion of the six large storage tanks.<sup>4</sup> [Vol. I, p. 94.]

B. The conversation prior to the execution of the written contract at which Davis explained to Ferer and Clements the reason for the exclusion of the gas line to one of the wells and the extension of the line to other wells.<sup>5</sup> [Vol. I, pp. 88 and 96.]

The foregoing illustrations of conflicts of testimony are sufficient answer to appellant's insistence on pages 46-52 of its brief that the allegations of Mr. Ferer's affidavit were undenied, must be accepted as true and that they compelled a summary judgment in favor of appellant as a matter of law.

In asserting error in the lower court's ruling on the motion for summary judgment, appellant incorrectly as-

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<sup>4</sup>See Statement of Facts, pp. 9-10 of this brief.

<sup>5</sup>See Statement of Facts, pp. 10-11 of this brief.

sumes that the question of whether the contract should be interpreted to include or exclude the casing in the wells was not an issue before the court in its determination of the motion for summary judgment. Appellant bases such claim (App. Br. pp. 23-28) on Judge Hollzer's memorandum [Vol. I, pp. 38-40] which accompanied his order denying Richfield's motion to dismiss the complaint, and in which he expressed certain views concerning the meaning of the contract. Those views were expressed by Judge Hollzer before Richfield had filed its answer to the complaint, which answer places in issue the question of whether the subject matter included the casing. Judge Hollzer's opinion was preliminary only; and at the outset of the trial, he indicated that the consideration of the evidence developed at the hearings on the motion for summary judgment gave him doubt as to the correctness of the opinion he had theretofore expressed concerning the interpretation of the contract [Vol. I, pp. 175-6].<sup>6</sup> That the

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<sup>6</sup>"When we came to consider the respective motions for summary judgment, the record on which included affidavits and depositions, evidence was developed which I think presents another aspect to the case. I have in mind particularly that the record as it was presented in support of these motions for summary judgment discloses circumstances surrounding or attending the execution of the contract. And, while I do not wish to be understood as having reached a final conclusion in the matter, I must say that I am impressed with this situation, namely, that a question has been raised in my own mind respecting the proper construction of this contract in the light of the circumstances attending and leading up to its execution as disclosed by the present record. And I feel that the question of what should be the final construction of the contract should not be considered as foreclosed. While, prior to the submission of these motions for summary judgment and upon a consideration of the complaint itself, we did express certain views as to the meaning of the contract, I feel that I ought to point out to counsel that I am not convinced as to the correctness of that ruling in the light of the circumstances leading up to and attending the execution of the contract as developed by the present record [Vol. I, pp. 175-6].

construction of the contract was considered by Judge Hollzer to have been an issue at the time of the hearing on the motion for summary judgment is clear from Judge Hollzer's statements at the opening of the trial.<sup>7</sup>

With some seriousness, appellant asserts (App. Br. pp. 32-34) that Richfield's answer and counterclaim had no standing in court and were sham because verified by a person who, it is charged, had no personal knowledge of the allegations. This charge may be disregarded inasmuch as appellant made no motion in the lower court to strike the pleading on that ground, in all probability because of appellant's familiarity with Rule 11 of the Federal Rules of Civil Procedure which provides that "except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit."

Appellant asserts that the contract could not have been reformed because of lack of proof of a prior oral agreement between appellant and Richfield. The authorities cited on pages 11 and 12 of appellant's brief do not re-

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<sup>7</sup>"While I shall still allow further time for the presentation of evidence (on the issue of the construction of the contract), such additional evidence as plaintiff may wish to offer, I think it may fairly be said that the issues which were raised in connection with plaintiff's motion for summary judgment still remain issues in the case. Otherwise, we would have granted the motion. The fact that we denied the motion would indicate that they are still to be tried . . . But the fact still remains that when your (appellant's) motion for summary judgment was denied, in spite of the previous ruling respecting the construction of the contract, I think it may fairly be construed to indicate that issues of fact respecting the execution of that contract had been raised in connection with your motion for summary judgment which had to be tried. I think among those issues of fact was what were the circumstances leading up to and attending the execution of the contract." (Parenthetical matter added.) [Vol. I, p. 182.]

quire that the oral understanding of the parties be a formal one; the sole requirement being that it is necessary to ascertain the intention of the parties to the transaction. *California Civil Code*, Sec. 3399, provides:

“When contract may be revised. When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express *the intention of the parties*, it may be revised, on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value.” (Emphasis ours.)

The quotation by appellant from the first case cited by it, *Fidelity Guaranty Fire Corporation v. Bilquist*, 108 Fed. (2d) 715, C. C. A. 9, refers to an “oral or *implied* agreement which the written contract was intended to express” (emphasis ours). In the second case cited by appellant, *Columbian National Life Insurance Co. v. Black*, 35 Fed. (2d) 571, the Circuit Court of Appeals for the Tenth Circuit reversed the judgment of the lower court on the ground that the lower court improperly denied reformation; and the Circuit Court of Appeals, after discussing the contention of the respondent concerning the necessity of a prior agreement, determined upon facts much weaker than those present in the instant case that a sufficient prior agreement to permit reformation was present.

Appellant’s argument that no prior oral agreement existed must be based solely upon the fact that there was no express statement during the conversations, which constituted the negotiations for the contract, that the casing in

the walls was not to be included in the subject matter of the transaction. It is not a requisite to a decree of reformation that the parties in their oral negotiations should have used the exact words or language which are being inserted in the contract by the reformation decree;<sup>8</sup> and accordingly, it is not necessary that there be proof of an express statement during the oral conversations that the casing in the wells was not included in the subject matter of the sale.

This same contention of the absence of a prior agreement was urged by appellant in the court below at the hearing on the motion for summary judgment. The court rejected such contention with language so appropriate that appellee adopts Judge Hollzer's statement here quoted from the transcript of the hearing, notwithstanding that such transcript is not a part of the record:

"The Court: I think the argument has made it fairly clear that the defendant's position on the subject of the oral contract, in substance, is this: That negotiations which were carried on between the representatives of the respective parties, extended over a period of some weeks, and that out of those negotiations we may, and should, draw certain conclusions, particularly that the fair inferences to be deducted from those negotiations are that the parties intended to enter into a contract of the character pleaded, as you say, in the form of legal conclusions, in the defendant's counter-claim, and that when the parties came to incorporate those conclusions, reached as a result of negotiations, though they had in mind one

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<sup>8</sup>*F. P. Cutting Co. v. Peterson*, 164 Cal. 44, at pages 47 and 48; 127 Pac. 163.

kind of an agreement, both sides knew, or had reason to know, that the written agreement was intended to merely put into definite, tangible form, that which the parties had arrived at as a result of some weeks of negotiations. Have I epitomized your contention in that respect?

Mr. Paradise: Yes.

The Court: When you (plaintiff's counsel) ask for the bill of particulars of the oral contract, I am wondering whether anything more can be said. In other words, if the theory of the defendant is that this oral agreement is based, not upon what was said at some particular hour, or some particular day of a particular month or year, but rather, you must take into consideration the series of conversations involving a number of individuals, and when you analyze them in their entirety, then you come to the conclusion that orally the parties determined to put into writing the particular understanding, such as that recited in the counter-claim, but, through inadvertence or mutual mistake, or, if you please, the mistake of one of the parties, which the other knew was being made, the wording of the written contract failed to conform to what the parties had orally said to be the terms of the written contract.

Mr. Krasne: I presume that is their contention.

The Court: Isn't that your theory?

Mr. Paradise: Exactly."<sup>9</sup>

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<sup>9</sup>Page 73, line 14, to page 74, line 25, of "Reporter's Transcript of Argument for Summary Judgment or for Bill of Particulars (Partial)," as reported by Reynolds & McClain, Official Shorthand Reporters, U. S. District Court.

The negotiations between the representatives of the respective parties took place over a period of several weeks and during such period there were several extensive conversations. These negotiations were of such nature that the terms of the purchase and sale arrangement which the parties intended to enter into can be ascertained readily. Even appellant will not challenge that prior to the execution of the written contract on January 17, 1941, the representatives of the parties had discussed the purchase by appellant and the sale by Richfield of certain producing and refining equipment and facilities at Casmalia; that the nature of the equipment and facilities had been discussed; that the price of \$22,000.00 had been agreed upon; and that there had been discussions of the nature of the work to be performed on the property by appellant. The only matter which was not specifically discussed was whether the equipment and facilities which had been listed in the preliminary memoranda prepared during such negotiations as "tanks, pipe, valves, fittings, buildings, boilers"<sup>10</sup> also included an additional unlisted item, to-wit, the casing in the oil wells on the land. The failure on the part of the representatives of both parties to mention the casing specifically cannot justify ignoring the fact that the parties, in their negotiations, had arrived at an agreement. The representatives of Richfield had no reason to

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<sup>10</sup>This same list, with certain changes following it, appears in both appellant's offer dated December 10, 1940 [Plaintiff's Exhibit No. 2, Vol. I, pp. 215-16], and Richfield's acceptance dated January 2, 1941 [Plaintiff's Exhibit No. 3, Vol. I, pp. 218-19].

mention the express exclusion of the casing. They knew that the subject matter of the sale was "surface equipment" and appellant's representatives had been so informed. In addition, Davis had in effect told Messrs. Ferer and Clements that Richfield intended to retain the wells and the casing cemented therein by his statements on January 8, 1941: first, that the storage tanks were to be retained for use in connection with future production operations; and second, that it was necessary to reserve gas lines to one well and perhaps to others to insure a sufficient gas supply to the superintendent's house.

Furthermore, appellant did not intend, either during the negotiations or at the time of the execution of the contract, to purchase under the contract the casing in the wells, or to perform the abandonment work on the wells in the manner required by law which would be necessary in connection with the removal of the casing therefrom. The court below so found in Finding No. 26 [Vol. I, p. 154] which was based on the testimony in Clements' deposition [Vol. II, pp. 797-807].<sup>11</sup>

Accordingly, the existence of a prior oral agreement, sufficient for the purpose of reformation, is clearly shown.

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<sup>11</sup>This matter of the intention of the appellant is discussed more fully on pages 46 to 50 of this brief in connection with appellant's attack on Finding No. 22.



II.

**The Court Below Correctly Sustained Appellee's Motion to Dismiss the First Cause of Action of the Amended Complaint by Which Appellant Sought Declaratory Relief and Specific Performance.**

The order of the court below that the motion to dismiss the first count of the amended complaint be sustained without leave to amend [Vol. I, p. 41] was based upon Judge Hollzer's memorandum of conclusions [Vol. I, pp. 38-41] which stated that appellant was not entitled either to declaratory or equitable relief.

That appellant misapprehended the nature of Judge Hollzer's ruling is clear from the statement in appellant's brief that "It therefore is plain that Count I was dismissed because the court concluded that no substantial controversy between the parties existed . . ." (App. Br. p. 78). Judge Hollzer's opinion states specifically the grounds for his denial of declaratory or equitable relief:

"It further appearing from the affidavit of one H. H. Kelly, filed herein on behalf of defendant, and from the statement made by defendant's counsel in open court, that defendant has notified plaintiff that the former contends that it did not sell to plaintiff said casing, also contends that plaintiff is not entitled to remove said casing, and has also notified plaintiff that defendant intends to and will prevent plaintiff from removing said casing . . .

"The Court further concludes that the damages arising from such breach of contract pertain to the sale and delivery of personal property, and that plaintiff is not entitled to declaratory or equitable relief herein." [Vol. I, p. 40.]

Assuming appellant successfully established that the subject matter of the contract included the casing in the wells, appellant would not have been entitled to specific performance either by way of injunctive relief or otherwise, and Judge Hollzer so held.

Specific performance was properly denied for the following reasons:

(1) The contract pleaded in the complaint was a contract for the sale of personal property and there was no showing in the complaint that the casing therein referred to had any special or unique value.

*California Civil Code*, Sec. 3387;

*Emirzian v. Asato*, 23 Cal. App. 251, 255 to 257;  
137 Pac. 1072;

*Richfield Oil Co. v. Hercules Gasoline Co.*, 112  
Cal. App. 431, 435 to 437; 297 Pac. 73;

*LeMoyne Ranch v. Agajanian*, 121 Cal. App. 423;  
8 Pac. (2d) 1055.

(2) The contract provided for the performance of a succession of acts continuous in their nature, performance of which could not be consummated by one transaction and which required supervision and direction and demanded special knowledge, skill and judgment.

*Poultry Producers, etc. v. Barlow*, 189 Cal. 278,  
281, 287 to 289; 208 Pac. 93;

*Pacific Etc. Ry. Co. v. Campbell-Johnston*, 153  
Cal. 106; 94 Pac. 623;

*Sheehan v. Vedder*, 108 Cal. App. 419, 427; 292  
Pac. 175.

(3) The contract provided for the rendition of personal services.

*California Civil Code*, Sec. 3390;

*Poultry Producers, etc. v. Barlow*, 189 Cal. 278, 281, 287 to 289; 208 Pac. 93;

*Coykendall v. Jackson*, 17 Cal. App. (2d) 729; 62 Pac. (2d) 746;

*Hill v. Waiting Mining Co.*, 87 Cal. App. 297, 301; 261 Pac. 1115;

*Peterson v. McDonald*, 13 Cal. App. 644, 648; 110 Pac. 465.

(4) Inasmuch as the contract would not be specifically enforceable against appellant, there was no mutuality of remedy.

*California Civil Code*, Sec. 3386;

*Poultry Producers, Etc., v. Barlow*, 189 Cal. 278, 281, 287 to 289; 208 Pac. 93;

*Hupp v. Lawler*, 106 Cal. App. 121; 288 Pac. 801;

*Moore v. Heron*, 108 Cal. App. 705, 709; 292 Pac. 136;

*Sheehan v. Vedder*, 108 Cal. App. 419, 427; 292 Pac. 175.

Nor was appellant entitled to declaratory relief for the following reasons:

(1) The trial court has discretion whether or not to grant declaratory relief. The parties to a case should not be required to try their rights piecemeal and the trial court will deny declaratory relief when it would not accomplish a full and complete determination of all issues.

Declaratory relief is properly denied when it appears that it will not be effective in settling the alleged controversy or where a declaratory judgment would serve no useful purpose or when it is not necessary or proper under all of the circumstances.

*Aetna Casualty & Surety Co. v. Quarles, et al.*, 92 Fed. (2d) 321, at pp. 325 and 326. C. C. A. 4, 1937;

*Angell et al. v. Schram*, 109 Fed. (2d) 380, C. C. A. 6, 1940;

*Delno v. Market Street Railway Company, et al.*, 38 Fed. Suppl. 341, D. C. Cal. 1941 (Decision by Judge St. Sure);

*Ohio Casualty Insurance Co. v. Murphy*, 28 Fed. Supp. 252, D. C. Ky. 1939;

*Zenie Bros. v. Miskend*, 10 Fed. Supp. 779, D. C. N. Y. 1935;

*Alfred Hofmann, Inc. v. Knitting Machines Corporation*, 37 Fed. Supp. 578, D. C. Del. 1941;

*State Farm Mutual Automobile Insurance Co. v. Hugee*, 32 Fed. Supp. 665, Dist. Ct. So. Carolina 1940 (Affirmed 105 Fed. (2d) 298);

*Anderson on Declaratory Judgments*, pp. 176-177;

*Borchard on Declaratory Judgments*, p. 108.

A declaratory judgment would have served no useful purpose in this proceeding. Even if appellant had been successful in establishing that the contract included the casing in the wells, no full or complete determination of

all issues between the parties would have been accomplished by a declaratory judgment to that effect inasmuch as it was apparent that any obligation to sell the casing in the wells was not specifically enforceable and any determination of whether appellant was entitled to damages and the determination of the amount of damages, if any, would have required further litigation.

(2) Judge Hollzer's memorandum [Vol. I, p. 40] referred to the affidavit of H. H. Kelly which disclosed that Richfield had theretofore notified appellant that it had not sold the casing in the wells, that appellant was not entitled to remove the casing and that Richfield intended to and would prevent appellant from removing the casing. This affidavit filed by appellee in connection with its motion to dismiss was properly considered by the court below in determining whether it would exercise its discretion in permitting declaratory relief.

*Delno v. Market Street Railway Company, et al.*,  
38 Fed. Supp. 341, D. C. Cal. 1941;

*Mutual Life Ins. Co. of New York v. Brannen*,  
31 F. Supp. 123, D. C. Iowa 1940.

When a plaintiff in reality seeks to obtain primarily, if not exclusively, consequential relief as distinguished from a declaration of rights, the cause of action is not one for declaratory relief. This is particularly true when an action is brought upon a contract the obligations of which have been breached prior to the commencement of the ac-

tion, in which event the cause of action is primarily for consequential relief.

*Delno v. Market Street Railway Company, et al., supra;*

*Brix v. People's Mutual Life Insurance Co.*, 2 Cal. (2d) 446, 37 Pac. (2d) 448, at p. 449;

*Standard Brands of California v. Bryce, et al.*, 1 Cal. (2d) 718, 721, 37 Pac. (2d) 446;

*Orloff v. Metropolitan Trust Co.*, 17 Cal. (2d) 484, 110 Pac. (2d) 396;

*Fritz v. Superior Court*, 18 Cal. App. (2d) 232, 63 Pac. (2d) 872.

It appeared from the affidavit of H. H. Kelly so referred to in Judge Hollzer's memorandum that if the subject matter of the contract properly included the casing in the wells, Richfield had theretofore breached the contract and that appellant's remedy was limited to damages.

III.

**Any Error by the Court Below in Sustaining the Motion to Dismiss the First Count of the Amended Complaint or in Denying Appellant's Motion for Summary Judgment Did Not Affect the Substantial Rights of the Parties.**

The duty of this Court to disregard formal or technical errors and determine a matter on appeal upon the substantial rights of the parties is contained in Judicial Code, Sec. 269, as amended by Act of February 26, 1919, C. 48, 40 Statutes 1181 (28 U. S. C. A., Sec. 391). The pertinent portion of that statute is as follows:

“On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.”

*Campbell v. United States*, 12 Fed. (2d) 873, 877 (C. C. A. 9, 1926), Certiorari denied 273 U. S. 722, 71 L. Ed. 859;

*Shuman v. United States*, 16 Fed. (2d) 457, 458 (C. C. A. 5, 1927), and cases cited therein;

*Fidelity and Casualty Co. v. Glenn*, 3 Fed. (2d) 913, 915 (C. C. A. 4, 1925);

*Norfolk Southern R. Co. v. Talbott*, 190 Fed. 737, 738 (C. C. A. 4, 1911);

*Martin v. Brown*, 294 Fed. 436, 440 (C. C. A. 8).

If this Court determines that the judgment of the trial court is properly sustained by its findings and conclusions and that the findings are supported by the evidence, it is apparent that the correct result has been reached and that any error in the rulings on the motion to dismiss or the motion for summary judgment has not been prejudicial to appellant.

#### IV.

**The Findings of Fact of the Lower Court Are Supported by Substantial Evidence; the Findings Are Sufficient to Support the Conclusions of Law and the Judgment; and the Conclusions of Law Sustain the Judgment.**

Appellant's claim of the absence of a prior agreement is briefly argued again in proposition IV (App. Br. p. 109) which asserts that the findings are insufficient to support the conclusions of law or the judgment, and in proposition V (App. Br. p. 110) which asserts that the conclusions of law do not sustain the judgment. These two propositions are stated most perfunctorily and are based upon the sole asserted ground of the absence of any finding by the court below of a prior agreement. This same statement was made on page 75 of appellant's brief. The plain answer to this repeated assertion is that it is untrue.

The court's finding No. 3 [Vol. I, p. 145] sets forth the oral agreement which was made by the parties prior to January 17, 1941. Finding No. 4 states: "To evidence such agreement, plaintiff and defendant executed a written contract dated January 17, 1941 [Plaintiff's Exhibit 4]." Finding No. 5 states the specific matter respecting which the contract dated January 17, 1941, did not truly express



the agreement or intention of the parties. It is not apparent how a trial court could frame clearer findings of a prior agreement. In making findings Nos. 3-5, the court below was aware of and rejected the argument made to it by appellant that there was no oral agreement.<sup>12</sup> Notwithstanding that appellant has challenged the sufficiency of practically every finding of the court (App. Br. pp. 82-109), no challenge is made to finding No. 3; nor did appellant propose any amendment to finding No. 3, although it did suggest amendments to most of the findings [Vol. I, pp. 124-133].

There remains to be considered appellant's proposition III which challenges the sufficiency of the evidence to support the findings. Before discussing the individual findings, however, certain observations should be made concerning the legal principles applicable thereto.

On pages 14 and 15 of its brief, appellant cites authorities in support of the rules concerning presumptions and burden of proof to the effect that it is presumed that the written instrument expresses the true intention of the parties; that the presumption is in favor of the correctness of the written instrument; and that the burden of proof is on the party who seeks reformation to show that the instrument does not express the intent of the parties. The authorities so cited by appellant merely establish the tests to be used by the trial court in weighing the evidence before it on the issue of reformation of a written contract.

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<sup>12</sup>The court's opinion which accompanied the findings, conclusions and judgment expressly recites: "It further appearing that plaintiff contends . . . that defendant has failed to establish any oral agreement to conform to which said written contract can be reformed." [Vol. I, p. 117.]

After the trial court has considered the evidence and testimony before it, and has made its determination, the appellate court will not decide as to the weight of the evidence where there is a conflict, or examine the evidence to determine where the preponderance lies, but will limit its inquiry to a determination of whether there is evidence tending to support the findings. The true rule is stated in *Speer v. Kittle Manufacturing Company*, 117 Cal. App. 717, 4 Pac. (2d) 575, where the appellate court, in affirming the trial court's judgment reforming a contract, said on pages 718-719:

"It is contended by the appellant that the evidence is insufficient to sustain a judgment of reformation of the contract in this: That in such actions to justify a reformation, the evidence must be clear and positive, leaving no room for doubt. Among other cases the appellant cites those of *Burt v. Los Angeles O. G. Assn.*, 175 Cal. 668 (166 Pac. 993); *Hochstein v. Berghauser*, 123 Cal. 681 (56 Pac. 547); *Luning v. Brooks*, 1 Cal. Unrep. 29; *Home & Farm Co. v. Freitas*, 153 Cal. 680 (96 Pac. 308); which are to the effect that the proof in actions for reformation of a written instrument must be clear and positive. While this is undoubtedly the rule, yet as said in *Capelli v. Dondero*, 123 Cal. 324, 328 (55 Pac. 1057), in an action to reform a deed: 'The principal question raised by appellant is that the evidence does not support the findings. It is true, as appellant contends, that evidence warranting the reformation of a deed must be clear and convincing, and not loose, equivocal, or contradictory, leaving the mistake open to doubt; and unless the proofs come up to this standard, equity will withhold relief. But these are rules for the government of the trial court, and are not

controlling in this court where findings find support in the evidence. (*Ward v. Waterman*, 85 Cal. 502 (24 Pac. 930).) This court cannot enter upon an examination of all the evidence to determine where the preponderance lies. Upon questions of fact its province is to determine whether there be evidence tending to support the findings, and it cannot decide as to the weight of the evidence where there is a conflict.' (*Hochstein v. Berghauser*, 123 Cal. 681 (56 Pac. 547); *Myerstein v. Burke*, 193 Cal. 105 (222 Pac. 810); *California Packing Corp. v. Larsen*, 187 Cal. 610 (203 Pac. 102).)

"Under the foregoing rule it is our duty to ascertain if the findings of the trial court granting reformation of the contract, are sustained by the evidence. If so, then we cannot weigh the evidence to ascertain its preponderance, (*Capelli v. Dondero*, *supra*)."

In *Nelson v. Meadville*, 19 Cal. App. (2d) 68, 64 Pac (2d) 1116, the court said on pages 71 and 72:

"Although the rule is that in order to justify a court in reforming, voiding or canceling an instrument on the ground of mistake or fraud, the proof of mistake or fraud must be clear, convincing and satisfactory to the court, yet a mere conflict of testimony as to the mistake or fraud does not necessitate a denial of relief. (*Hutchinson v. Ainsworth*, 73 Cal. 452 (15 Pac. 82, 2 Am. St. Rep. 823); *Wilson v. Moriarity*, *supra*; *Sullivan v. Moorhead*, *supra*.) And the decision of the trial court upon such conflict of evidence is conclusive upon this court. (*Brison v. Brison*, 90 Cal. 323, 334 (27 Pac. 186).) The question of a mistake or fraud was the issue between the parties, and the trial court found, upon the conflict of evidence before it, that the instruments

had been executed as the result of such mistake and fraud. We cannot say from the evidence in the record that the court was not justified in making such findings.”

See, also:

*Hercules Gasoline Co. v. Security Ins. Co.*, 122 Cal. App. 499, 10 Pac. (2d) 128.

This Court has often stated the same rule as applicable to challenged findings of fact.

*The Hermosa*, 57 Fed. (2d) 20, at p. 24, C. C. A. 9, 1932;

*National Federal Insurance Co. v. Scudder*, 71 Fed. (2d) 884, C. C. A. 9, 1934;

*The Bergen*, 64 Fed. (2d) 877, C. C. A. 9, 1933;

*McCullough v. Penn. Mut. Life Ins. Co. of Philadelphia*, 62 Fed. (2d) 831, C. C. A. 9, 1933;

*Clements v. Coppin*, 61 Fed. (2d) 552, C. C. A. 9, 1932;

*Olympic Salt Water Company v. Shipowners' and Merchants, Tugboat Company*, 48 Fed. (2d) 49, C. C. A. 9, 1931;

*Standard Oil Co. v. Shipowners' & Merchants' Tugboat Co.*, 17 Fed. (2d) 366, C. C. A. 9, 1927.

The conclusiveness of findings of the trial court is not changed in any respect by the circumstance that the contract was prepared by the attorney for the party seeking reformation. The language of the court in *Moore v. Vandermast*, 19 Cal. (2d) 94; 119 Pac. (2d) 129, quoted by appellant (Appellant's Brief pp. 14 and 15) refers solely to the same requirement of "clear and convincing

evidence" mentioned above, and does not establish any additional requirement for reformation in cases involving the preparation of the contract by an attorney for the party seeking such relief. Compare *Los Angeles Co. v. New Liverpool Co.*, 150 Cal. 21, at pp. 25-28; 87 Pac. 1029.

In its brief appellant has divided the findings into two groups, those of ultimate facts and those of evidentiary facts. On pages 83 and 84 of its brief it discusses those findings which it classifies as ultimate facts. Appellant does not attack any of such findings of ultimate facts other than to state: "It is important and noteworthy that by none of these findings did the court find that the parties ever entered into an oral contract prior to the execution of the written contract." As stated above, finding 3 is an express finding of such prior agreement made prior to January 17, 1941.

Appellant's only challenge is to specific findings which appellant declares are evidentiary findings only. Before proceeding to a discussion of these findings, it should be pointed out that even if appellant's attack upon such findings were successful, a reversal of the judgment would not be warranted because the judgment is still sustained by the unchallenged findings of ultimate facts. The rule is recognized that findings of probative or evidentiary facts will not control, limit or modify the findings of ultimate facts, or tend to establish that the ultimate facts were found against the evidence unless the ultimate findings are necessarily based on the probative findings and are completely overcome.

*Fitzpatrick v. Underwood* (1941), 17 Cal. (2d) 722, 727; 112 Pac. (2d) 3.

In *Gregg v. Manufacturers Bldg. Corp.*, 134 Cal. App. 147; 25 Pac. (2d) 1014, the court said on page 152:

“The trial court made findings on all of the material issues. It also made the findings now attacked by the defendant. But the latter findings are but findings of probative facts. *The findings on the ultimate facts support the judgment. Those findings may not be ignored because findings on probative matters were also made.* (Rankin v. Newman, 107 Cal. 602 (40 Pac. 1024, 41 Pac. 304).)” (Emphasis ours.)

*Finding No. 8.* In finding No. 8, challenged by appellant at pages 84-92 of its brief, the court found that neither Richfield nor any of its employees intended that any of the wells at Casmalia be abandoned or that any casing be removed from the wells or that there be sold to the appellant any of the casing in any of the wells. The court found further that casing cannot safely be removed from a well without complying with the requirements of the California Division of Oil and Gas regulating the abandonment of wells. At the start of its argument, appellant states: “There is some testimony in support of this finding. It all came from the defendant’s employees.” This acknowledgment is of itself sufficient to dispose of appellant’s attack in view of the authorities cited above concerning the conclusiveness of findings of a trial court supported by substantial evidence. In *Menning v. Sourisseau*, 128 Cal. App. 635; 18 Pac. (2d) 77, cited and relied upon by appellant, the District Court of Appeal affirmed the judgment of the trial court reforming a lease as prayed by the defendant in its answer. The unsuccessful plaintiff asserted, as grounds for reversal, that there was a substantial conflict of evidence and that the

findings on reformation were based upon the testimony of the defendant alone. The appellate court rejected such contention as a basis for reversal and said on pages 638 and 639:

“The special defense above set forth was supported in all particulars by defendant’s testimony. It is true that it stands unsupported except by some corroborating circumstances, while it was denied by plaintiff’s witnesses, but the determination of the conflict was within the province of the trial court.

“His testimony standing alone, uncontradicted, is clear and convincing and this court cannot reverse the judgment of the trial court on the ground that such evidence is contradicted by other evidence. ‘The only question which we have to decide in respect to the sufficiency of the evidence, is whether that which tends to prove the alleged fraud or mistake, if standing alone, without contradiction, would make out a *prima facie* case.’ (*Jarnatt v. Cooper*, 59 Cal. 703; see, also, *Roush v. Kirkman*, 42 Cal. App. 115 at 119 (183 Pac. 353).) \* \* \*

“The direct evidence of one witness who is entitled to full credit is sufficient for the proof of any fact in civil cases. (Code Civ. Proc., sec. 1844.) The trial judge or a jury are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number (Code Civ. Proc., sec. 2061).  
\* \* \*

“Defendant’s demeanor on the stand, his appearance and his manner of giving testimony may have been sufficient to convince the trial judge of the defendant’s honesty, integrity and the truthfulness of

his testimony. That being true, his testimony alone sustained the burden of proof, overcame the presumption that the written lease embodied the true intent of the parties and justified the trial judge in his conclusion that the plaintiff and his sons did not tell the truth on the stand.”

Appellant urges that the testimony of these employees concerning their intention is not to be believed because their statements were made “within the privacy of their employer’s office and among themselves” (App. Br. p. 85). This argument again goes only to the weight of the evidence and is answered by *Menning v. Sourisseau* (*supra*). The same is likewise true of the contention on pages 85-89 of appellant’s brief that the testimony of these employees is not to be believed because after Richfield’s employees had read the contract “no one mentioned the casings or requested that a provision for their exclusion be added to the writing.” This latter contention is not truly an attack upon finding No. 8; and if it has any bearing at all, it is pertinent only to appellant’s argument concerning negligence in connection with its attack upon finding 29. In the interests of clarity, the argument will be answered as part of the discussion of finding 29 and will not be repeated here.

However, the finding as to the intention of Richfield and of its employees is based not alone on testimony of its employees as to their intention, but is founded largely on other facts and circumstances corroborative of such intention, which facts and circumstances occurred in such



manner that both knowledge and suspicion of Richfield's intention must have been gained by appellant. These include:

(1) The work performed at Casmalia during the summer of 1940 under the Anderson contract [Defendant's Exhibit A, Vol. I, pp. 265-278] at which time the derricks, tubing and rods were removed from the wells which were then capped at the surface in order that they might in the future be opened and re-entered for the production of oil therefrom [Vol. I, p. 91];<sup>13</sup>

(2) The various instances during the negotiations when appellant's representatives, Messrs. Ferer, Clements and Zeidenfeld, were each told that the property to be sold was "surface equipment" [Vol. I, pp. 83-86, 97, 375-384];

(3) The conversation on January 8, 1941, when Davis told Messrs. Clements and Ferer that the six large storage tanks "were not to be sold because the production department wanted to retain them for storage purposes in the event the wells were re-opened" [Vol. I, pp. 229 and 230, 251 and 252, 291];

(4) The conversation during which Davis pointed out to Messrs. Ferer and Clements on a map of the property (a copy of the same map which is attached to the contract) the gas line from the superintend-

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<sup>13</sup>Appellant had knowledge of the performance of this work by Anderson. Clements, who was experienced in the oil business and familiar with the abandonment of oil wells [Vol. II, pp. 786-802, and p. 831], had knowledge of the nature of the work performed by Anderson and knew that the wells had not been abandoned [Vol. II, pp. 766-770].

ent's house to one of the wells on the property, at which time he stated that Richfield desired to exclude such line from the sale in order that the superintendent's house could continue to receive gas from such well, and at which time he stated that it might be necessary to exclude gas lines running to other wells on the property in order to insure a sufficient gas supply to the superintendent's house [Vol. I, pp. 88, 96, 233 and 234]; and

(5) The provision of the contract itself (paragraph 1, subparagraph h) which excludes "gas lines connecting wells on the land above described to the superintendent's house" and the legend in red on the map attached as Exhibit A to the contract, to-wit, "And any extensions of gas line necessary to furnish gas to Duncan's house." [Vol. I, p. 149.]

In commenting on the portion of finding 8 that casing cannot safely be removed from an oil well without complying with the requirement of the California Division of Oil and Gas regulating the abandonment thereof, appellant argues on pages 89 and 90 of its brief that "since the written contract conveyed the casings it must be inferred that defendant intended to comply with the said regulations, if any action by Richfield was necessary. A contract to sell implies a covenant to deliver." This same argument is also made on pages 94 and 99-101 of appellant's brief in connection with findings Nos. 9 and 22, where it is argued that it was Richfield's obligation to abandon the wells. This argument will be answered here.

Appellant's statement is clearly wrong for two independent reasons:

(1) There has been no finding or determination (other than the preliminary opinion of Judge Hollzer concerning which he thereafter expressed doubt)<sup>14</sup> that the written contract conveyed the casing and such a statement merely begs the issue in this litigation.

(2) There could not possibly be any determination that it was Richfield's obligation under the contract to abandon the wells even if the contract did include the casing in the wells within its subject matter. Paragraph 2 of the contract [Vol. I, p. 29] requires the Buyer (appellant) to perform all work in connection with "the dismantling, removal and disposition of all facilities and equipment to be purchased by Buyer hereunder . . .". This provision of the contract was made the basis of the determination by the court below that it would have been *appellant's* obligation under the contract to abandon the wells and that, since appellant never intended to abandon all of the wells and did not understand that it would have any such obligation, there was a mutual mistake which warranted the reformation [See Findings 22, 27 and 28, Vol. I, pp. 153 and 154].

On pages 90-92 of its brief appellant states that the intent of a corporation can be ascertained only through its authorized officers and asserts that although references have been made throughout the testimony to the

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<sup>14</sup>See discussion on pages 15 to 17 of this brief.

Richfield "management" to which recommendations had been made by Mr. Montgomery, "nowhere in the testimony of any witness can be found any information as to what person or group of persons constituted the 'management.'" Both Mr. Kelly [Vol. I, pp. 330-334] and Mr. Montgomery [Vol. II, pp. 467 and 468] testified concerning the weekly executive meetings of Richfield's president and vice-presidents and the heads of the respective departments, at which meetings the policies of the corporation are determined to a large extent.

*Finding No. 9.* Finding No. 9 concerns the history of the Casmalia oil field during the period from 1917 to 1940, and of the plans of Richfield and its predecessors during that period for the reopening of the field for the production of oil, and the steps taken in furtherance of such plans.

That portion of the Statement of Facts in this brief at pages 5 to 8 sets forth the testimony and evidence in support of this finding, together with appropriate references to the record; and such matters will not be repeated here.

Appellant's attack on finding 9 has no merit, and is limited to a suggestion of fanciful inferences. Appellant points to no conflict of evidence or testimony whatsoever in the record and there is none to be found.

*Findings 11, 12, 13, 14, 16, 17 and 21:* The court below found that reformation was warranted on two of the grounds provided in California Civil Code, Sec. 3399, to-wit, (a) a mutual mistake, and (2) a mistake on the part of Richfield which was known or suspected by appel-

lant. Findings Nos. 11, 12, 13, 14, 16, 17 and 21 are each separate and individual facts and circumstances on the basis of which the court found in finding No. 10 that the appellant and its employees knew and suspected, prior to and at the time of the execution of the contract, that Richfield did not intend to sell the casing in any of the wells on the Casmalia property or to have any of the wells abandoned. Each of such findings is supported by substantial and compelling evidence and as to most of them, there is not even any conflict of evidence pointed to by appellant.

Appellant's brief states that the facts covered by such findings have been discussed in the portion of appellant's brief devoted to the motion for summary judgment, and would not be repeated. But that portion of appellant's brief necessarily was limited to a discussion of the evidence before the court at the hearing on the motion, to-wit, the affidavits and depositions, and did not discuss the testimony and evidence presented to the court at the trial. Appellant has the duty, in challenging the findings, to point out to this Court the failure or absence of substantial evidence supporting such finding. Appellant wholly fails in such duty and disregards completely all of the testimony and evidence presented to the Court in a trial which occupied several court days. Inasmuch as appellant's attack is so meager, no effort will here be made to prove the sufficiency of each of such findings by references to the testimony and evidence presented to the court at the trial.

Appellant here argues that neither Ferer nor Clements was charged with notice of anything McGahan may have said. This is a reiteration of the contention on page 41

of its brief that "no one intending to buy equipment from Richfield was required to pay attention to the details of a transaction by an employee whose authority extended only to the notification of prospective buyers that property was to be sold."<sup>15</sup> McGahan's authority was not so limited [Vol. I, pp. 376-377]. At the trial appellant did not object to the competence, relevance or materiality of McGahan's testimony that he had told Ferer, Clements and Zeidenfeld that the equipment to be sold was "surface equipment" and appellant cannot raise such objection here. Furthermore, the question of whether or not McGahan had authority to execute the sales contract on Richfield's behalf is unimportant. What is important is that regardless of his lack of authority to execute the contract, he did know what Richfield proposed to sell and had the duty of notifying prospective bidders in that respect and did so notify them that the equipment so to be sold was surface equipment. Under these circumstances, appellant cannot validly claim that it did not receive knowledge or notice of the nature of the property to be sold [Vol. I, pp. 352 and 376-383].

*Finding No. 15.* The court's finding of the common meaning in the oil industry of the expression "surface equipment," together with its finding that casing in an oil well is not referred to in the industry as "surface equipment," but is commonly referred to as "subsurface equip-

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<sup>15</sup>This contention is wholly at variance with the position taken by appellant concerning a memorandum prepared by Davis who likewise had no authority to execute the written contract on Richfield's behalf. On page 87 of its brief, appellant states: "At this point in the negotiations a statement by Davis was a statement by Richfield."

ment,” is clearly supported by the evidence of Davis [Vol. I, pp. 260, 261, 309 and 310], McGahan [Vol. I, pp. 86, 355, 412 and 413] and Montgomery [Vol. II, pp. 488-492].

Appellant's sole attack on this finding is based on an argument that casing may be considered as “production equipment and facilities,” notwithstanding that both Montgomery and McGahan testified that casing is not so considered [Vol. I, pp. 410-413, and Vol. II, pp. 488-492]. Appellant's argument is not pertinent. The common meaning of the phrase “surface equipment” was significant because of the knowledge and suspicion of Richfield's intention that McGahan's statements about “surface equipment” gave to appellant. There were no conversations about “production equipment and facilities.” While the phrase “producing equipment and facilities” does appear in the recital in the contract [Vol. I, p. 26], the appellant is not here challenging the interpretation of the agreement; and in an action for reformation the court is not confined to an inquiry of what the language of the instrument was intended to be.

*California Civil Code*, Sec. 3401.

*Finding No. 18.* Appellant does not challenge finding No. 18, but merely questions its significance. The significance of this finding is the notice that it gave to an interested party on appellant's side of the transaction that Richfield intended not to have the wells abandoned and accordingly, to retain the casing in the wells. As discussed above, Clements was experienced in the oil business, and was familiar with the abandonment of wells, and he knew that in Anderson's work in removing the derricks, tubing and rods from the wells, shortly before the negotiations

for the Ferer contract, the wells were not abandoned. Had Richfield desired to have the wells abandoned, such abandonment could have readily been accomplished as a part of Anderson's work [Vol. II, p. 469].

*Finding No. 22.* Appellant's argument concerning Richfield's obligation to abandon the wells (App. Br. pp. 99-101) has already been answered on pages 40-41 of this brief.

In addition to determining that the contract was subject to reformation because of a mistake of Richfield which appellant knew and suspected, the court below also determined that reformation was proper because of a mutual mistake of the parties. This mutual mistake is predicated upon (1) the intention of Richfield not to sell the casing in the wells or to have any of such wells abandoned; and (2) the intention of appellant not to abandon all of the wells. Finding 22 must be considered in connection with findings 26 and 27 wherein the trial court found that appellant did not intend to perform the abandonment work on the wells in the manner required by law which would be necessary in connection with the removing of casing therefrom; that appellant did not intend to assume any obligation to Richfield under the contract to perform such abandonment work on the wells; and that appellant did not understand or consider that it would have any such obligation.

Paragraph 2 of the contract provides in part as follows: "Buyer (appellant) agrees at its sole cost and expense to perform the following work . . . Such work shall include the dismantling, removal and disposition of *all* equipment and facilities to be purchased by Buyer



hereunder, as above provided, . . . ." [Vol. I, p. 29]. If appellant had intended to purchase the casing in the wells under such contract with the necessary result that the casing would have been part of "*all* equipment and facilities to be purchased by Buyer hereunder," it would have been necessary under such quoted provision of the contract that appellant intend the "dismantling, removal and disposition of *all*" such casing and the abandonment of *all* of the wells on the property. Clements testified that it is necessary to abandon a well in order to remove the casing from it [Vol. II, p. 786].

Appellant, however, did not intend to abandon all of the wells on the property or any specific number of wells. Appellant's intention was to abandon *only such* of the wells in which the quantity of recoverable casing therein would make the abandonment work profitable. Findings 22, 26 and 27 are amply supported by the evidence. Clements testified: "There were certain wells we might not be able to abandon for the reason they might be of such a nature they would cost you more to abandon them than to leave them alone, in which case we were going to leave those alone that wouldn't show any profit." He also testified that they were only guessing how many wells would be profitable and they would not know which were profitable until they had opened up the holes. [Vol. II, pp. 795 and 796]. Clements and Ferer discussed the matter of abandonment on the occasion of their visit to the Casmalia property prior to December 10, 1940, the date of appellant's written offer to Richfield [Vol. II, pp. 799 and 800]. They considered that it would be desirable to abandon some wells and not others and that there would be some wells which would have a minimum of casing

which would not prove very profitable [Vol. II, pp. 801-803]. None of this was ever discussed with Richfield or any of Richfield's representatives and neither Ferer nor Clements ever stated to Richfield their intention of abandoning only part of the wells and not abandoning others [Vol. II, pp. 802 and 806].

Clements testified that they did not intend to assume any contractual obligation to abandon any one or more of the wells [Vol. II, pp. 802-807].

On pages 99 and 100 of its brief, appellant attempts to distort the language of finding 22 to give it a meaning that appellant misunderstood the provisions of the contract. An examination of finding 22 in connection with findings 26 and 27 and in the light of the evidence referred to above discloses quite clearly that while appellant understood its obligation under the contract to dismantle, remove and dispose of all equipment and facilities, it did not intend that this obligation would apply to or include the abandonment of the wells. In this connection, the language of this Court in *Clyde Equipment Co. v. Fiorito*, 16 Fed. (2d) 106, C. C. A. 9, 1926, is pertinent:

"If a finding is susceptible of two constructions, one of which supports the judgment and the other does not, the former will prevail; and whenever, from facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn. The findings of fact by a trial court must receive such a construction as will uphold, rather than defeat, its judgment. (*Burleigh v. Consumers Publishing Co.*, 95 Wash. 50, 51, 163 P. 5; *Breeze v. Brooks*, 97 Cal. 72, 31 P. 742, 22 L. R. A. 256."

Appellant attempts to escape the compelling effect of this evidence of appellant's intentions by contending, first, that the foregoing testimony of Clements related to a time when the deal was still in the embryonic stage and before actual negotiations had begun, and second, that Ferer's intentions concerning the abandonment of the well were different from those to which Clements testified (App. Br. pp. 102 and 103).

As regards the first excuse, the testimony appearing on pages 797 and 806 and 807 of Volume II shows most emphatically that Clements' statements related not only to the time of inspection of the property by Ferer and Clements, but also to the time of the execution of the contract when the provisions of the contract were before him. The contract was not drafted until the second week of January, 1941, and their inspection occurred early in December of 1940. Indeed, Clements' testimony at the places mentioned reveals that the absence of an assumption of any obligation remained as his intention at the time of the taking of the deposition, over a year after the date of the contract. On page 102 of its brief, appellant quotes a statement of Clements as indicating an intention to abandon the wells different from that to which he had formerly testified; but an examination of the record [Vol. II, p. 807] reveals that the statement so quoted was an answer given by Clements at his deposition in response to a question expressly limited to the matter of cleaning up the surface of the property.

As regards the second excuse, Ferer's testimony as to his understanding of the obligations of the contract concerning the abandonment of the wells may be disregarded for the reason that he had testified that he was inexperi-

enced in transactions of this nature and that he intended to leave to Clements the matter of the abandonment of the wells [Vol. II, p. 878]. The utmost that can be said from appellant's standpoint is that the evidence is conflicting; and as a result, the finding must stand.

*Finding No. 29.* On pages 103-107 of its brief appellant challenges the finding that the mistake was not caused by or the result of negligence of Richfield. In addition to the authorities cited on pages 32 to 35 of this brief concerning the conclusiveness of findings of the trial court, the court's attention is called to the following cases where the finding of the trial court that the party seeking reformation was not negligent was affirmed by the appellate court:

*Los Angeles Co. v. New Liverpool Co.*, 150 Cal. 21, 25-28; 87 Pac. 1029;

*Sullivan v. Moorehead*, 99 Cal. 157, 160 and 161; 33 Pac. 796;

*Seim v. Cooper*, 79 Cal. App. 748, at pp. 754 and 755; 250 Pac. 1106;

*Columbian National Life Insurance Co. v. Black*, 35 Fed. (2d) 571, at p. 575, C. C. A. 10, cited in appellant's brief.

In *Hanlon v. Western Loan & Bldg. Co.*, 46 Cal. App. (2d) 580; 116 Pac. (2d) 465, the court said on pages 597 and 598:

"Appellants contend that the loan company was negligent in preparing and in not reading and discovering the mistake in the description; that in such circumstances there is no right of reformation; that the mistake must occur without fault or negligence of

the party who complains of it. That is not a correct statement of the law. It is true that there are cases denying reformation where the person seeking that relief was negligent. (See cases collected and commented on in *California Trust Co. v. Cohn*, 214 Cal. 619 (7 Pac. (2d) 297).) But there are other cases holding that failure to read a contract does not necessarily prevent a reformation. (See *Los Angeles & R. R. Co. v. New Liverpool Salt Co.*, 150 Cal. 21 (87 Pac. 1029); *Travelli v. Bowman*, 150 Cal. 587 (89 Pac. 347); *Cantlay v. Olds & Stoller Enter-Exch.*, 119 Cal. App. 605 (7 Pac. (2d) 395).) *Whether the failure to discover the defective description was the result of inexcusable negligence, so as to preclude relief by way of reformation, or, whether the failure to discover the error was the result of excusable neglect, is a question of fact, the determination of which rests largely in the discretion of the trial court.*" (Emphasis ours.)

With intemperate and reckless language of fraud, appellant charges Richfield's employees with gross negligence; first, in signing an agreement which did not expressly provide that the casing in the wells was excluded; and second, in not stating expressly to appellant that the casing was excluded.

The failure of the contract expressly to exclude the casing is a matter not of negligence, but was the mistake itself, as stated by the court below in finding No. 29. It is to be noted that although the contract contains a list of many items included within the subject matter of the sale, to-wit, "pipe-lines, valves and fittings, buildings, boilers, pumps, engines, motors, tanks, metal and lumber now located on said land . . .," there is no mention

of casing; and a reading of such list by a person signing the contract would not of itself call to his attention the fact that it might be claimed by the other party to the contract that the casing was included in the subject matter. Kelly signed the contract on behalf of Richfield. He testified as to his intention not to sell the casing [Vol. I, pp. 89 and 90]; and he also testified concerning his understanding of the phrase "metal and lumber" appearing in such list [Vol. I, p. 92]. Montgomery approved the contract before it was signed by Kelly. He also testified concerning his intention that the wells be not abandoned and that the casing not be removed; and he testified further that he would not have approved the contract had there been any provision therein for the abandonment of the wells or the removal of any of the casing therefrom [Vol. II, pp. 475 and 480-481].

Any failure of Richfield's employees not to mention expressly in conversation that the casing was to be excluded or that the sale was limited to "subsurface equipment" is no proof of negligence and is readily explained: first, by the fact that all of the persons representing appellant, Ferer, Clements and Zeidenfeld, had been told that the subject matter of the sale was "surface equipment" and accordingly, there was no occasion or necessity to reiterate the matter; and second, by the fact that all of the items of equipment discussed in the conversations consisted of surface equipment.

On the other hand, the evidence before the court would well have justified an express finding of negligence on

the part of appellant in making no inquiry concerning the casing. The matters constituting appellant's negligence are covered in findings Nos. 11, 12, 13, 14, 16, 18, 19 and 20. Finding No. 11 relates to the conversation at which Messrs. Ferer and Clements heard Davis say that Richfield intended to use the wells on the Casmalia property for the future production of oil and for that reason declined to include the six large storage tanks. Finding No. 12 relates to the conversation at which it was explained to Ferer and Clements that gas lines to one or more wells on the property were excluded in order to insure sufficient gas supplies to the superintendent's house. Findings Nos. 13, 14 and 16 relate to the conversations at which Clements, Ferer and Zeidenfeld were told that the equipment to be sold was "surface equipment." Finding No. 18 relates to the information obtained by Clements that in Anderson's work in removing the derricks, tubing and rods from the wells, the same were not abandoned. Appellant's brief is significantly silent concerning findings Nos. 19 and 20 wherein the court found that although Ferer and Clements visited Casmalia prior to the execution of the contract, and made a visual inspection of the surface equipment thereon, neither they nor any one else on appellant's behalf made any inspection to ascertain the length or the size or the weight or the condition of the casing in the oil wells. The court found further that at the time of executing the contract, appellant was not informed concerning the number of the wells or the length, size, weight, or condition of the

casing, and that appellant had not ascertained or secured any estimate of the cost of abandoning any such wells. It was further found that at the time of executing the contract appellant did not know and made no effort to ascertain whether the condition of any of the wells was such that the cost of abandoning the same would exceed the value of any salvage recoverable by abandonment. The court found also that at no time prior to the execution of the contract was any inquiry made by or on behalf of appellant of the California Division of Oil and Gas respecting what requirements and regulations must be complied with in the matter of abandoning any wells or removing any casing from any wells at Casmalia and that at the time of executing the contract appellant did not know what such requirements or regulations were. Such findings are fully supported by the depositions of Messrs. Ferer and Clements [Vol. II, pp. 755, 764-772, 787-788, 849-851, 865-866, 880-883, 889-890, 897, 900 and 913].

That such matters constituted negligence on appellant's part is particularly clear when viewed in the light of finding No. 21 wherein the court found that at no time during the negotiations antecedent to the execution of the contract or at the time of its execution, was there any discussion or mention between appellant or its employees or representatives and Richfield or its employees or representatives of abandoning any of the wells at Casmalia or removing any casing therefrom. [Vol. I, pp. 152 and 153.]



Under these circumstances, the language of the court in *Metropolitan Casualty Ins. Co. v. Stone*, 124 Cal. App. 430, at page 437; 12 Pac. (2d) 665, is particularly pertinent:

"The defendants contend that the plaintiff should not be given any relief because the mistake, if any, arose by reason of the plaintiff's negligence. To that contention there are two answers. In the first place the trial court made no finding that the plaintiff was guilty of negligence. (*Mahoney v. Standard Gas Engine Co.*, 187 Cal. 399, 407 (202 Pac. 146).) In the second place there is some evidence that when the bond was originally discussed these defendants were to be required to execute it; that thereafter it appeared the better plan was to act through the Pacific Corporation Company and that the fault in the execution of the indemnity contract, if any, was as much the neglect of the defendants as it was of the plaintiff."

*Finding No. 30.* Appellant challenges finding No. 30 wherein the court stated that in view of its finding concerning reformation, it was unnecessary to make any finding concerning the proper construction or interpretation of the written contract either on its face or in the light of surrounding circumstances.

Such finding was eminently proper. Notwithstanding that the interpretation of the contract was an issue which had not theretofore been determined,<sup>16</sup> the relief of reformation granted to appellee rendered unnecessary any determination by the court below of the issue of interpretation.

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<sup>16</sup>See footnotes 6 and 7 of this brief.

V.

**The Proper Construction and Interpretation of the Contract in the Light of Surrounding Circumstances Is That the Subject Matter Thereof Was Limited to Equipment and Facilities Located on the Surface of the Land and Did Not Include the Casing in Any of the Oil Wells.**

Appellee contended in the lower court and contends here that the proper interpretation of the contract in the light of the circumstances attending and leading up to its execution is that the subject matter thereof was limited to the equipment and facilities located on the surface of the land and does not include the casing in any of the wells. This proposition of interpretation, which was the issue created by appellant's complaint and Richfield's answer thereto, must be decided only if this Court determines that the judgment of reformation cannot be sustained.

To outline briefly the matters hereinafter discussed, it will be shown: First, that the contract is not, as asserted by appellant, clear and unambiguous in including the casing in the subject matter thereof and accordingly, that parol evidence is proper as an aid to interpretation; second, that an interpretation that the subject matter included the casing would be contrary to the intention of both parties and that such an interpretation would violate statutory rules of construction; and third, that the parol evidence offered clearly compels an interpretation that the subject matter excluded the casing.

(1) It cannot be asserted seriously that the contract is clear and unambiguous as to the inclusion of the casing. The contract does not use the word "casing" in the list of the types of equipment to be sold. Such list contained

in paragraph 1 of the contract is explicit and no mention of casing or pipe can be found therein. If for purposes of discussion it can be assumed that either the phrase "producing facilities and equipment"<sup>17</sup> or the phrase "metal and lumber" is broad enough to include the casing in the wells, various ambiguities and contradictions are immediately apparent on the face of the contract:

(a) All references in the contract to the subject matter are of equipment "on the land" and are not, as appellant's asserted interpretation of the contract would have it read, of equipment "on and *in* and *under* the land." The contract repeatedly uses the phrases "now located *on* said land." The deliberate use throughout the contract of the word "on" demonstrates an intention to limit the facilities and equipment to be sold to those of surface equipment and to exclude subsurface equipment. The rules governing the interpretation of words and phrases used in a contract are governed by Cal. Civ. Code Secs. 1638 and 1644. In *Riser v. Federal Life Insurance Co.*, 224 N. W. 67 (Iowa), the Court said on page 68: "The prepositions 'in' and 'on', when used to designate location are never synonymous. 'In' means 'within—the interior.' 'On' means 'upon—the surface.' "

*Rester v. Moody & Stewart*, 134 So. 690 (La. 1939);

*Ruckert v. Grand Ave. Ry. Co.*, 63 S. W. 814, 818 (Mo. 1901).

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<sup>17</sup>This phrase is found in a recital of the agreement and does not appear in paragraph 1, where the list of equipment is set forth.

(b) A second contradiction would result when application is made of the accepted rule of construction known as "*Expressio unius est exclusio alterius*," to-wit, that the express mention of certain items results in the exclusion of others not mentioned.

*California Civil Code*, Sec. 1656;

*California Civil Code*, Sec. 3534;

*California Code of Civil Procedure*, Sec. 1859;

*Scudder v. Perce*, 159 Cal. 429, 114 Pac. 571;

*Van Loben Sels v. Producers Fruit Company*, 36 Cal. App. 201, 179 Pac. 403;

*Quisle v. Bresner*, 180 N. W. 467, at pp. 468 and 469 (Mich. 1920);

*Scanlan v. Houston Lighting & Power Co.*, 62 S. W. (2d) 537, at p. 540 (Texas 1933);

*Henne v. Summers*, 16 Cal. App. 67, 71, 116 Pac. 86;

*Denver Joint Stock Land Bank v. Markham*, 107 Pac. (2d) 313, 316;

*Wm. Lindeke Land Co. v. Kalman*, 252 N. W. 650, 652 (Minn. 1934);

*In re Barnett's Trusteeship*, 251 N. W. 59, 60 (Iowa 1933).

In *Althoff Mfg. Co. v. Althoff*, 123 Pac. 326 (Colo. 1912), the contract provided:

" . . . all the assets, real and personal, of said firm or standing in our name and now a part of the property of Althoff & Son. An inventory of said property has been made and is found in that certain Book marked . . . for identification and which

we surrender to you for better description of said property. The property proposed to be sold includes good will, all leases, outstanding monies, accounts, all contracts, policies of insurance, claims and choses in action, patents and patentable ideas, or inventions incident to the business for which your company as a manufacturing corporation has been created, whether included in said inventory or not, and all things in general owned or used by said firm in the conduct of its business at said #1411-15 Wazee Street.”

Notwithstanding the all-inclusive list of items to be sold as stated in the contract, the court held that the sale of all the assets of the copartnership did not include certain stock of a corporation of the value of \$16,000 which the copartnership had received during the year preceding the sales agreement in the course of its business. In so holding that the stock was excluded from the sale, the court said on page 328:

“. . . If this stock had in fact been sold by the defendants and bought by the plaintiff, it is manifest that its existence would have been known to it, constituting a part of the consideration of the purchase and sale, and it would have been specifically mentioned in the agreement, being an item of such great importance and value compared with the total amount involved in the transaction.”

In *Barnett v. Logan*, 10 S. W. 440 (Mo. 1919), the description in the bill of sale was as follows:

“The same to include all machinery and equipment used in connection with said mill.”

The Court applied the rule of construction referred to above and held that the sale did not include a particular motor which was not specified in an inventory attached to the bill of sale. In so holding the Court said on page 442:

“The inventory, although containing 68 separate and specific items, makes no mention of the motor, though it was of much more value than a number of items specified . . .”

(c) One of the express exceptions in the contract from the equipment to be sold is “(h) gas pipe lines connecting wells on the land above described to the superintendent’s house PR.-1494.” (Paragraph 1 of the contract.) The map attached as Exhibit A to the contract contains the following legend in red:

“And any extensions of gas lines necessary to furnish gas to Duncan’s house.”

The apparent purpose of this provision to provide for future transportation of gas from the wells to the superintendent’s house would be defeated by any abandonment of the wells which would render impossible any future production of gas. A repugnancy would therefore result from any interpretation that the subject matter included the casing in the wells.

*California Civ. Code*, Sec. 1652;

*California Civ. Code*, Sec. 1648;

*California Code of Civil Procedure*, Sec. 1858.

Such ambiguities, contradictions and repugnancies which would result from an interpretation that the contract included the casing, permit the introduction of parol evidence concerning the surrounding circumstances and

the intention of the parties. This is so clear under the law of California, that no citation of authority is necessary other than reference to Cal. Civ. Code, Sec. 1647, and Cal. Code of Civil Procedure, Sec. 1860.

All of the evidence before the trial court was offered on the issues of both the interpretation of the contract and the reformation thereof [Vol. I, pp. 187 and 253], and no objection to such introduction of evidence on the question of interpretation was ever made by appellant. The court below stated that the evidence was to be considered on both issues. [Vol. II, p. 496.]

(2) Any interpretation that the subject matter includes the casing would be contrary to the intention of both parties to the contract and would violate statutory provisions concerning the construction of contracts.

*California Civil Code*, Sec. 1636;

*California Civil Code*, Sec. 1643;

*California Civil Code*, Sec. 1648.

The court below found that neither of the parties to the contract intended that the casing in the wells was to be included in the subject matter thereof (findings 10, 22, 23, 26 and 27). The sufficiency of the evidence to sustain such findings has been thoroughly discussed in other portions of this brief, at pages 46 to 50.

(3) The testimony and evidence of the circumstances surrounding the negotiations and execution of the contract, including the intention of the parties thereto, has been discussed in detail in the preceding portions of this brief in connection with the propriety of the decree of reformation.

Appellee respectfully submits that the proper interpretation of such contract in the light of such surrounding circumstances, is that the subject matter was limited to surface equipment and did not include the casing.

Appellant's contention before the trial court that the language of the contract required an interpretation that the subject matter included the casing was based upon the following phrases in the contract: (1) "various refinery and producing facilities and equipment"<sup>18</sup> and (2) "metal and lumber."<sup>19</sup> Neither of these phrases is in any way inconsistent with an interpretation that the equipment to be sold did not include the casing.

While the trial court made no specific finding on the matter, there was sufficient evidence that casing installed in oil wells is not encompassed by the phrase "producing facilities and equipment" in the common meaning of such phrase in the oil industry [Vol. I, pp. 410-414; Vol. II, pp. 491-494]. Likewise, there was sufficient evidence that the phrase "metal and lumber" was not intended to refer to the casing in the wells, but was inserted in the contract for the purpose of identifying various items of loose metal scattered about the surface of the property

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<sup>18</sup>This phrase is contained in the opening recital, to-wit, "Whereas, Seller is the owner of a certain parcel of real property in Santa Barbara County, California . . . on which parcel of property are located various refinery and producing facilities and equipment, and . . ." [Vol. I, p. 26.]

<sup>19</sup>This phrase is used following the list of equipment in paragraph No. 1 of the contract.



which were not specifically enumerated in the list of equipment set forth in paragraph 1 of the contract [Vol. 1, pp. 86, 87, 92, 94 and 95].

It should be noted that appellant's offer of December 10, 1940 [Plaintiff's Exhibit 2, Vol. 1, pp. 215 and 216], which is one of the preliminary memoranda upon which appellant has placed so much reliance in its brief, and which offer was made subsequent to the inspection of the Casmalia property by Ferer and Clements, contains no mention of "producing equipment or facilities."<sup>20</sup>

### Conclusion.

In conclusion, we respectfully submit that the judgment below rendered for appellee should be affirmed. The rulings of the trial court in sustaining appellee's motion to dismiss the first cause of action of the complaint and in denying appellant's motion for summary judgment were clearly correct, and in any event caused no prejudice to appellant. The judgment of the court below reforming the contract to make it expressly provide that the casing in the wells was excluded from the equipment and facilities to be sold thereunder and that appellant had no obligation as a part of its work under the contract to abandon said wells or remove any casing therefrom was clearly correct upon two of the grounds specified in Cal. Civ. Code, Sec.

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<sup>20</sup>In appellant's offer the equipment is described as "all tanks, pipe, valves, fittings, buildings, boilers, and all other materials now situated on your Casmalia refining and producing property."

3399. The failure of the contract to provide for such express exclusion resulted both from a mutual mistake and a mistake of appellee of which appellant both knew and suspected.

Appellee submits further that even if the decree of reformation of the lower court be determined to have been incorrect, nevertheless the contract properly interpreted excludes the casing from the subject matter thereof.

It is our earnest conviction that the evidence and the law require that the judgment of the court below be affirmed.

Respectfully submitted,

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No. 10743

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

AARON FERER & SONS, a co-partnership,  
*Appellant,*

*vs.*

RICHFIELD OIL CORPORATION, a corpora-  
tion,

*Appellee.*

---

APPELLANT'S CLOSING BRIEF.

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**FILED**

MAY 10 1945

**PAUL P. O'BRIEN,**  
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APPELLANT'S CLOSING BRIEF.

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Appellee's Statement of Facts.

In the statement of facts set forth in appellee's brief in trying to support the theory that various items indicate its intention to exclude well casings from the sale to Ferer & Sons, many items are irrelevant even for that limited purpose. For example, the fact that Montgomery instructed Kelly to take steps for the removal of rods and tubing in wells, because they were in a precarious condition but to refrain from removing the casings, which were not in a precarious condition, has no tendency to show that later, and in a different transaction the Richfield Corporation did not intend to sell the casings. Nor does the fact that Montgomery gave said instructions to Kelly "after the matter had been recommended at one of the executive meetings." add color to the event or give it meaning. This follows because it must be assumed

that the executive group took no action in the matter or some record thereof would have been produced. The fact that in a previous contract with A. M. Anderson no provision was made for the removal of casings has no tendency to prove that in the subsequent and considerable later sale of equipment and facilities not removed by Anderson the casings were not intended to be sold. In fact evidence relative to the Anderson transaction tends to establish, if it bears on that question at all, that in the later transaction casings were intended to be sold, because all of the equipment and facilities sold to Ferer & Sons were retained and excluded from the Anderson contract and the inference logically results that Richfield's intention, as distinguished from the intention of Mr. Montgomery, in making the sale to appellant was to dispose of everything left after Anderson's operations had been completed. It is said, (Rep. Br. p. 7). "During the summer of 1940 it was decided at one of the executive meetings to make a combination sale . . . and Kelly was instructed to sell the surface equipment." This statement is wholly without evidentiary support. Appellee clearly implies that Kelly was instructed by action taken *at one of the executive meetings* to sell surface equipment, but appellee did not produce an iota of evidence to sustain that assertion. Other statements on pages 7 to 11 inclusive, concerning instructions purporting to have come from some executive meeting or made by an employee of the defendant are equally without foundation and irrelevant because no proof whatever was produced to show that *any official* action was taken at any executive meeting of the persons whom Montgomery and others called "management", and there is a like dirth of evidence to show that the defendant corporation authorized McGahan to tell Zeidenfeld or Ferer that

“surface equipment” would be sold, or that the defendant had any intention other than that evinced by the written contract. These and other similar items of which the statement of facts chiefly consists will be discussed and devitalized under the appropriate captions. At this point appellant merely desired to challenge the statement of facts generally as not warranted by the record.

I.

**No Prior Meeting of the Minds or Oral Agreement  
Was Established.**

A very considerable portion of appellant's opening brief is devoted to the thesis that no agreement was proved to have been made in the instant transaction other than the written contract dated January 17, 1941, whereas it is a prerequisite to reformation of a written contract that a prior agreement be established. This thesis is set forth and elucidated under caption I., pages 35 to 75 and further in the discussion of the findings. As presented by appellant this is of major importance in the decision of this appeal. Opposing counsel's reply to the presentation of this issue in the opening brief, is as brief, indefinite and evasive as was the statement of the trial judge concerning the same subject, which statement is set forth in appellee's brief, page 20. It will bear repetition. Judge Hollzer said: (Rep. Br. p. 20.)

“When you (plaintiff's counsel) ask for the bill of particulars of the oral contract, I am wondering whether anything more can be said. In other words, if the theory of the defendant is that this oral agreement is based, not upon what was said at some particular hour, or some particular day of a particular month or year, but rather, you must take

into consideration the series of conversations involving a number of individuals, and when you analyze them in their entirety, then you come to the conclusion that orally the parties determined to put into writing the particular understanding, such as that recited in the counter-claim, but, through inadvertence or mutual mistake, or, if you please, the mistake of one of the parties, which the other knew was being made, the wording of the written contract failed to conform to what the parties had orally said to be the terms of the written contract”.

It is apparent that plaintiff’s counsel had requested some statement as to when and where the supposed prior agreement was entered into, and who participated in making it, and, what, in substance at least was said to evidence that the minds of the parties met upon the terms set forth in the written agreement as later modified by the court’s decree. Such a request would not have been unfair or presumptuous. It is the right of any litigant whose property rights are about to be taken from him by a court decree to know that every legal essential to such harsh and extraordinary procedure has been duly established. Judge Hollzer’s reply is a definite confession that he could not name any of the material particulars. As to the persons who made the prior agreements the only information given was that “a number of individuals” had “a series of conversations” and thus “orally the parties determined to put into writing the particular understanding”. We know from the evidence that if we exclude the loose statements of “individuals” who had no authority to negotiate this or any contract for their employers, it is not the truth that “a number of individuals” took part in a “series of conversations”. Again, neither the court nor opposing counsel could state

any date or approximate time when anyone, even including the unauthorized McGahan, Zeidenfeld and Kelly, ever agreed upon a single term or provision of the contract in writing, much less the entire agreement which it evidences. Search the reply brief from cover to cover and no such conversation between anyone connected, even remotely, with this transaction will be found. The record shows and the truth is that both parties dealt in generalities entirely until Mr. Ferer made a written offer for what he understood Richfield had to sell which with certain modifications Richfield accepted. The offer is plaintiff's Exhibit 2 and the acceptance is plaintiff's Exhibit 3 and the language of both instruments is all-inclusive, limited only by the exceptions which Richfield expressly specified. When it came to drafting the written agreement Richfield added to the exceptions but *in none of these writings were casing of the oil wells excepted from the sale*. Richfield's able attorney, Mr. Paradise, declared that the court had stated his client's theory "exactly" (Rep. Br. p. 20) and had, in a statement even more general and brief than that above quoted "epitomized" defendant's contention. The statement of the court referred to only proves that even the jurist had no idea that a prior agreement had actually been entered into. He said that negotiations had been carried on over a period of some weeks and "out of those negotiations we may, and should draw certain conclusions, particularly that the fair inference to be deducted from those negotiations is that the *parties intended to enter into the contract pleaded,*" in defendant's counter-claim.

This was a guarded non-committal expression of the court's viewpoint which shows, that based upon the premise that negotiations had extended over some weeks, the court *surmised*, he said *inferred*, something. What

did he surmise? That the parties *intended* to enter *into* a contract, etc. He did not surmise or even purport to infer that they *entered into* a contract, but merely that they *intended to* enter into a contract. What *contract*? Not that contract pleaded *but one of that type*. This can import nothing more than a contract to sell some oil field equipment and facilities upon some terms which would be satisfactory to both parties. It is not too much to say that both Judge Hollzer and Mr. Paradise well knew that nothing more toward actually entering into a contract prior to the one prepared by Richfield's attorney had taken place.

Appellant's opening brief called upon defendant to point out the evidence from which the existence of a prior contract could be inferred. Opposing counsel have failed to produce even the beginning of such a "bill of particulars". Their utmost efforts have merely brought out indications of *intentions* and intentions are the limit in the findings of the court.

For counsel's information, and not addressed to the court, perhaps the following elementary principles will clarify the problem:

A contract is an agreement between persons, upon sufficient consideration, to do or not to do a particular thing;

*Mutual promises, made at the same time*, are sufficient considerations for each other;

There must be a meeting of the minds of the parties upon the same thing, and in the same sense, at the same time; *without which there can be no contract*;



Four things are necessary:

1. *Parties able to contract;*
2. *A sufficient consideration;*
3. *A subject matter to be contracted for;*
4. *An actual contracting by proposal on the one side and acceptance on the other.*

The foregoing principles are set forth in "Robinson's Elementary Law", a standard text commonly used in law schools.

The subject matter of the instant contract is generally oil field equipment and facilities. According to appellee's witnesses those who could contract for it were "management" and Mr. H. H. Kelly and Harold David were authorized to negotiate this contract. Mr. Ferer was able to contract for appellant, and no one else, so said he, and there is no proof to the contrary. Hence, the contention of appellant as made in its opening brief is that none of said authorized agents of Richfield ever, at any time prior to January 17, 1941, made a proposal which Ferer & Sons by its authorized agent accepted concerning the sale of the subject matter of said contract or accepted a proposal in reference to the same which was made by the authorized agent of Ferer & Sons. Of course a proposal and acceptance that a certain pump or that a pile of brick or that casings should be included or excluded in the sale would not constitute a contract for sale of the subject matter. Also a contract may be implied from conduct and circumstance, as where "A" makes a proposal and "B" acts upon it. "B's" acceptance will be presumed, but acting upon "A's" proposal involves doing something which, according to the proposals, "B" would do if the parties had so stipulated by an ex-

press contract. No decision has ever held that a contract is implied where "A" merely uses data which "B" has given for purposes of investigation of "B's" property or as the basis upon which to make an offer. Nor has it ever been held that from the fact that the parties had "discussed" the purchase by one and the sale by the other of certain property, it will be presumed that they entered into a contract for the sale and purchase of the property. The fact that in addition there had been "discussions" of the nature of the work to be performed on the property by the purchaser, could not perfect the basis for a presumption that a proposal by one party and an acceptance by the other had eventuated. These are the only evidences except one other, of the alleged prior contract which appellee has produced in its attempt to meet appellant's challenge. (Resp. Br. p. 21.) However, appellee naively asserts "even appellant will not challenge . . . that the price of \$22,000.00 had been agreed upon;". It must be borne in mind that all of these matters are claimed by appellee to have occurred in oral conversations. The foregoing assertion is naive to a point almost beyond belief. Having presumably read appellant's opening brief with reasonable care opposing counsel must have known if able to understand and retain, the import thereof, that appellant had most definitely challenged the proposition above set forth. There is no testimony of any witness that the sum of \$22,000.00 was ever mentioned in any conversation. The nearest approach to such testimony was given by David Zeidenfeld who said that he told Mr. Ferer that "if he was interested in buying that property, he would have to bid somewhere in the amount of \$20,000.00 (Rep. Br. p. 436). Zeidenfeld said on cross-examination that he "picked up" this figure "in going around among people

who might have been bidding” or “from some person”. He said, “I would not swear to it under oath but I believe I did mention to Mr. Ferer about \$20,000.00 might take the deal on a lump sum basis”, etc. [R. p. 439]; He also testified: “I don’t think Mr. McGahan ever mentioned the sum of \$20,000.00 to me . . . I will say that Mr. McGahan didn’t give me any actual information of \$20,000.00; that as far as that figure is concerned I took it on myself, to say that that will be the amount that will buy the deal from my discussions with Mr. McGahan, although he didn’t give me the exact amount.” [R. p. 452.] McGahan said, “I asked him whether anyone of several figures would get the deal and that McGahan declined to answer but I thought he smiled when I mentioned the figure of \$20,000.00.” [R. p. 453.] Morris Ferer swore that Zeidenfeld “did not tell me that it would take about \$20,000.00 . . . to make an acceptable bid. He did not ever mention a sum in connection with this.” [R. p. 821.] The foregoing reveals the type of circumstances upon which appellee argues that a prior oral agreement is legally presumed to have been entered into, and the foregoing is the evidence which seems so convincing that opposing counsel, no doubt *sincerely* asserts, “even appellant will not challenge that . . . the price of \$22,000.00 had been agreed upon.” It might be supposed that the failure of McGahan to testify that he told Zeindenfeld that the bid would need to be \$22,000.00 or even \$20,000.00, or to admit that he “smiled” when Zeidenfeld mentioned the sum of \$20,000.00, would have suggested to defendant’s

counsel that even if two minor employees could make a contract for Richfield, and Ferer & Sons, minus McGahan's smile the supposed contract was unilateral and assented to only by the buyer.

Appellant's opening brief, pages 11 and 12, quotes or cites five decisions, California and Federal, and other authorities which hold that the first essential to the right to reform a written contract is proof of a prior contract. Appellee selects the two Federal decisions and attempts to show that they hold otherwise, and in fact support appellee's theory that the prior agreement may consist of intentions to make a contract and nothing more. In this behalf appellee says of *Columbian National Life Ins. Co. v. Black* that the opinion actually reversed the decision of the lower court on the ground that it *denied reformation* and held "on facts much weaker than those present in the instant case, that a sufficient prior agreement to permit reformation was present." It is believed that appellee's counsel has failed to industriously analyse the opinion in that case, which shows that the prior contract consisted of a written application by Black for a particular type of policy, to-wit, the company's "ordinary life plan", and an acceptance of the offer by the company concerning this prior agreement the opinion shows that there is ample authority for the proposition that when an insurance company approves the application as made, and issues a policy, "there is, at that moment, a meeting of the minds—an agreement to issue the policy applied for."

Hence, as a matter of law, as settled by precedent, the proof of the prior agreement was complete, uncontradicted and conclusive. To compare it, as weaker, with the mere secret intentions of the parties which the court inferred or conjectured from the fact that the parties had carried on negotiations "for weeks", is as palpably a fallacy as would be exhibiting a black object and declaring that it is white.

However, the court fully recognized the law to be as the defendant Black contended, and said, as quoted in the opening brief that before a writing may be reformed to express a real agreement "the parties must have agreed." The mistake in that case consisted of the fact that the printer "used the form of an ordinary life policy for the first page, but on the reverse side had erroneously used a form for an "endowment policy". Here, again, the evidence of the mistake, and the manner in which it was made cannot be compared with the factual situation in the instant case, in which there is neither evidence or finding as to the essential element; how and by whom the mistake was made, and there was an entire lack of competent or substantial evidence that any mistake was actually made. The opinion in the *Columbian Company* case, said "without resorting to any oral evidence, the papers in this case on their face bear conclusive proof of the mistake that can be and should be corrected in equity." This statement obviously true, for a comparison of the application and its acceptance with the policy which was issued revealed the mistake. Oral uncontradicted evidence established how and by whom it was made.

Appellee points out that the opinion in *Fidelity Guaranty Fire Corp. v. Belquist*, 108 Fed. (2d) 715, quoted by appellant, recognized that the prior agreement may be implied. To be sure any contract may be implied if the facts warrant it, but nowhere in the reply brief does appellee bring to the court's attention any fact or matter not mentioned by Judge Hollzer in response to plaintiff's request for "a bill of particulars" of what constituted the prior agreement, and, as has been shown the trial court failed and impliedly confessed that it could not comply with the request. The weakness and lack of point in appellee's criticisms of the foregoing cases is emphasized by the failure of the reply brief to discuss or attempt to distinguish the California cases cited or quoted in the opening brief which also sustain the rule that proof of prior agreement is essential to the right to reform a written instrument. These cases are set forth on pages 12, 76 and 77 of the opening brief, among which are those to which civil code Section 3399 was held to be applicable.

Among such decisions is *Auerbach v. Healy*, 174 Cal. 60 and *Carpenter v. Froloff*, 30 Cal. App. (2d) 400. Cases of that type hold that the proof must show that the parties had a prior "understanding" in respect to some particular term or point, which the written contract fails to include or which it excludes (*Moore v. Vandermaast*, 19 Cal. (2d) 94).

In the absence of such understanding, which is a part of an entire prior agreement, the rest of which is

properly set forth, the aggrieved party's remedy is rescission but not reformation, because to reform a contract where no prior contract had been entered into would require that the court *create a new agreement* upon which the minds of the parties had never met. If, as the reply brief implies the decisions in the *Guaranty Fire Corporation v. Belquist* and *Columbian National Life* cases, support appellee's theory that no prior agreement need be shown, "the sole requirement being that it is necessary to ascertain the intentions of the parties to the transaction", (Rep. Br. p. 18), appellant will be glad to rest this issue upon this court's interpretation of these two cases.

In support of its theory appellee cites *Cutting Co. v. Peterson*, 164 Cal. 44 wherein a cause of action was held to have been sufficiently alleged to comply with civil code Sec. 3399. In that case the written contract was worded exactly as the parties intended, and the entire controversy was waged over their understanding the price at which the sales under the contract should be made. "This requirement of Peterson was communicated to the Cutting Co. by Oliphant and that company thereupon agreed that the contract should contain a provision to that effect," but insisted that this should apply to its general printed price list and not to special prices made by the company to particular customers. Oliphant said that Peterson then agreed to this arrangement. Thereupon Oliphant drafted the contract which both parties signed. The company failed to issue a printed general list of prices for the season in question, and the company sought reformation of the

written contract to make it conform to the implied provision specifying that the buyer, Peterson, should not pay a price higher than the opening prices fixed for the trade generally of the association. However, the opinion clearly shows that there had been a prior oral agreement. It is recited that Mr. Oliphant, a broker acted as "go-between or mutual agent of both parties" and talked with Peterson and with officers of the company. He testified that when he talked with Peterson the latter said that he would not agree to enter into the proposed contract unless he was assured it contained a clause guaranteeing him against the opening prices fixed by the association so that if the association should name prices for the season lower than the prices named in the agreement, then the association's prices prevail.

Section 3399 has made no change in the rules governing reformation of contracts, except to add to the ancient ground of mutual mistake, mistake of one party which the other suspected, and this additional ground differs from fraud only in that, although the suspecting party owes no duty to the other, he may not remain silent while the other acts to his prejudice. Reformation, as a remedy still presupposes a prior contract, and the rule to that effect stated in *Auerback v. Healy* and *Carpenter v. Froloff*, both *supra*, has not been abrogated, nor has appellee distinguished them from the instant case.



II.

**The Court Erred and Abused Any Discretion Which It May Have in Ordering the Count of Appellant's Complaint Wherein Declaratory Relief Sought, Dismissed.**

Appellee contends that the Trial Court correctly sustained its motion to dismiss the first cause of action in the complaint by which declaratory relief was sought. However, appellee's brief is not specific and leaves the reader to speculate upon the theory or theories relied upon to support that contention. The brief first dissents from appellant's statement that Judge Hollzer's ground for dismissing this count was the conclusion by him that no substantial controversy existed between the parties, as shown by his "memorandum of conclusions." In that behalf, appellee's brief, (p. 23), quotes Judge Hollzer's opinion in which it is recited that according to the affidavit of H. H. Kelly, the defendant had notified plaintiff of its contention that it "did not sell to plaintiff said casing" and that it would prevent plaintiff from removing the same. The opinion is also quoted as saying "the damages arising from the breach of the written contract pertain to the sale and delivery of personal property." and the court adds, "and that plaintiff is not entitled to declaratory or equitable relief." Appellant fails to see in these statements an indication that they were intended to embody its ground for dismissing the declaratory relief count. We are impelled to reject that theory because to adopt it would impute to the trial court a degree of unfamiliarity with the Federal Declaratory Relief provisions which it is hardly reasonable or fair to assume. The portion of the opinion first quoted merely concedes and confirms the allegation of the plaintiff's pleading that an "actual controversy between the parties exists", which is an essential

ingredient of a proper case for declaratory relief. Nor is the second portion of the opinion apposite as a statement of a ground for refusing to take jurisdiction. Federal Courts undoubtedly have jurisdiction to decide rights pertaining to personal property and by N. S. C. 28:400, it is expressly provided that in addition to declaring the rights of the parties the court may grant further relief whenever necessary or proper. *Stephenson v. Equitable Life Assur. Soc., etc.*, 92 Fed. (2d) 406. *Moore's Fed. Prac.* Vol. III, 1938 Ed. p. 3119, note. In *Zenie Bros. v. Miskend*, 10 Fed. Supp. 779, a case relied upon by appellee, the District Court denied a motion to dismiss and declared that the complaint did not go too far in asking for an injunction and damages saying, "Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper . . . . If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated, to show cause why further relief should not be granted forthwith."

It does seem a bit strange that opposing counsel overlooked this note in one of their prize decisions when citing it as holding that declaratory relief will not be granted where such a judgment "would serve no useful purpose." Also, as pointed out in Appellant's opening brief, in view of Rule 57 it is hardly open to dispute that, as Ohlinger (Vol. 3, p. 779) says even "the right to trial by jury is saved" and the District Court, having determined that an actual, present, justifiable controversy existed, had the right and the duty to try, with or without a jury, the issue of damages, if he believed it necessary to grant complete relief and prevent piece-meal litigation." At any rate it can hardly be assumed that the trial judge did not know the law to be as above quoted, and if he did

it would be illogical to suppose as appellee argues that his ground for granting the motion to dismiss was that the controversy related damages to personal property and that no equitable relief could be granted.

Of course an injunction might issue to prevent the defendants from interfering with the removal by plaintiff of property which it had purchased and owned, and the court had ample power to take evidence and decide the issue as to damages.

### **Appellee's Indefinite Theories.**

It has been said that in discussing the issue now being elucidated, appellee's theories are obscure. On pages 24 and 25 of its brief appellee cites California Code Sections and cases to show that for four distinct reasons "specific performance was properly denied." In the expressive vernacular typical of General Patton, appellant asks, "So what?" Appellee's brief does not attempt to answer the question. Almost in the same breath it points out that appellant's count I asked for damages. Immediately thereafter and in the same discussion it cites the *Zenic Bros. v. Miskend*, *supra*, case which clearly indicates that damages may be, and in proper cases should be granted, and the same decision holds that "constitutional Federal Courts' judicial power is broad enough to cover suits authorized by Declaratory Judgment Act in cases of actual controversy, proceedings for such judgment being justiciable as concerning existing controversy between parties capable of binding determination." (See Syllabus, point 2). It further holds that a judgment in such a case is not merely advisory but constitutes a binding determination. So, why peruse statutes and decisions dealing with the essentials prerequisite to granting specific performance? The issue of appellant's right

to specific performance is a false quantity in this case for three reasons:

1. A complete case for Declaratory relief is presented for a determination of the rights of the parties without reference to any other relief;

2. If specific performance could not be had the court has the power to award damages;

3. Specific performance was not asked in Court I. Numbers 1 and 2 have been discussed. The code sections and cases relied upon by appellee are irrelevant and wholly inapplicable to the facts as they appear in Count I and as Judge Hollzer describes them in his "memorandum of conclusions". We have here, not a contract to sell but *a sale*. The contract was fully executed by Ferer and Sons. It had paid the full purchase price for every item of property comprised in the written contract. Payment had been made for the well casings and Ferer & Sons had removed everything except the casings which it had purchased. The only thing left to be done by Ferer & Sons was to remove the casings, and acts incidental thereto. Nothing was required of the Richfield Company, except to cooperate in such removal if necessary. However, defendant claimed that it still owned the casings and threatened to prevent plaintiff from removing the property which it had paid for. Hence the primary relief sought was a Declaratory Judgment in the nature of a decree adjudging that plaintiff had contracted and paid for and purchased the well casings and was the owner thereof. In an action to quiet title where plaintiff's title is confirmed, if out of possession, he is entitled to a writ of possession even though

the judgment makes no provisions for such writ (22 Cal. Jur. p. 194; *Keele v. Clouser*, 92 Cal. App. 526; *Park v. Powers*, 2 Cal. (2d) 590). Also, the court may and often does enjoin the defendant from claiming any right, title or interest in or to the property in question (*San Diego Imp. Co. v. Brodie*, 215 Cal. page 97). Authority for the above statement that in substance and effect the instant declaratory relief count stated a cause of action to quiet title. In *Davis v. American Foundry Company*, 94 Fed. (2d) 441, the suit was for a declaration of plaintiff's rights in a contract. It was alleged that the defendant had broken the agreement by its failure and refusal to pay four installments provided for therein and alleged to be past due. The District Court dismissed the suit and the court of appeals reversed the judgment, and in that behalf said:

"But it is observed that the question in controversy is the validity of the contract which has an admitted value of at least \$9,500.00. Plaintiff sought the aid of the court in the form of a decree declaring the contract void. This is a suit not for coercive relief but for damages thus far approved but rather for declaratory relief. True, it is that the plaintiff might not invoke the court's jurisdiction in a suit to recover \$2,000.00 in money but this suit is for other relief. It is in the nature of a suit to quiet title by which equity jurisdiction is involved in order to secure the decree of non-existence of the apparent clouds on one's title. So, here plaintiff seeks to have the court remove any doubt from the validity of the contract in such a situation to exercise jurisdiction under the Declaratory Act is not to extend the jurisdiction of

the court, but merely to hasten the day when that jurisdiction may be invoked and as in suits quieting title the amount in controversy is the value of the thing which it is said is encumbered with a voidable cloud.”

Hence, appellee’s reason “1” is wholly inapplicable. In none of the cases cited in support of that reason was the sale of personal property completed. In each of them the seller was required to make delivery, upon which event, the buyer’s payments became due. In *LeMoyne Ranch v. Agajanian*, 121 Cal. App. 423, the contract contemplated that the seller must acquire the garbage and then deliver it to the buyer. In such cases, the relief sought is, actually specific performance. Appellee’s reason “2” is obviously irrelevant. No “succession of acts continuous in their nature”, as appellee claims, are involved. It can be of no moment that Ferer & Sons was required to perform a succession of acts in removing all of the equipment which Richfield sold them, since only one act was in controversy and the rest had been performed. Appellee’s reason “3” is factually non-existent. No personal services by the defendant were required by the instant contract. Appellee fails to point them out, and none are involved. Number “4” is not apposite. The issues of mutuality of remedy only arises where the contract is executory as to both of the contracting parties. It is absurd to compare the situation herein involved with such cases as *Poultry Producers etc. v. Barlow*, 189 Cal. 278, which appellee cites as authority under reasons 2, 3 and 4. The contract upon which that action was based was a marketing

agreement by which the plaintiff corporation was required to receive and sell the poultry to be raised by Barlow and others and they bound themselves to deliver and accept the proceeds, less certain costs, which the corporation should collect for the poultry. This contract involved a multiplicity of transactions with each poultry raiser and much detail concerning the duties of the parties. However, we here have the second instance in which a case cited by appellee provides a final and negative answer eliminating a proposition for which the case is cited, and showing that the same is irrelevant to the facts of the instant case. In discussing the question of mutuality of right to relief it is pointed out in *Poultry Producers* decision that under Section 3386 of the Civil Code, if the plaintiff "has performed . . . all or substantially all of his obligations", the rule against specific performance which requires that there be mutuality of right to relief does not apply. In the instant case *Ferer & Sons* had paid the total purchase price and they had removed all of the equipment which they had purchased from Richfield Company except the well casings which the Richfield Company refused to permit plaintiff to take. It follows that under the doctrine of the *Poultry Producers* decision and the express provisions of Civil Code Section 3386 the mutuality rule upon which appellee relies in no way concerns that case because here the plaintiff had paid the full purchase price, and was entitled to have the cloud on his title resulting from the defendant's adverse claim, removed, and plaintiff had performed substantially all of the work which he contracted to do.

### Appellee's More Specific Grounds.

The first named of these grounds is "The trial court has discretion whether or not to grant declaratory relief." This is a stock reason which we find advanced by appellees in all or nearly all of the cases where the trial court has dismissed or otherwise refused to entertain suits for such relief. However, in enumerating the grounds upon which it has been held that the trial court might properly exercise its discretion by dismissing the suit, appellee again blindly crosses itself up.

It is said: The parties should not be required to try their rights piece-meal and the trial court will deny declaratory relief when it would not accomplish a complete determination of all issues.

Appellant readily subscribes to this doctrine. In fact we embrace and emphasize it as sound, and in so doing point out that this was one cogent reason which the court gave in *Zenic v. Miskend*, 10 Fed. Supp. 779, for holding that the plaintiff *was entitled to a declaratory judgment*, it being held, as has been shown, that the court would, if necessary to provide complete and full relief not only declare the rights of plaintiff but give such other relief in equity or in law as might be necessary to that end. So, in the instant case, had the trial court not recanted its views after deciding that the written contract clearly included the well casings in the sale to appellant, and if it had so adjudged, nothing remained to be done except to issue a writ of possession or an injunction against defendants interfering with the removal of the purchased property by its owner, Ferer & Sons. Also, if a judgment for damages were found to be merited the trial court had jurisdiction to award that relief—all in this action, and thus to remove *the necessity of piece-meal litigation*.



Appellee cites six other cases all of which uphold the right of the court to dismiss where a declaratory judgment "will not be effective in settling the alleged controversy and would serve no useful purpose." These decisions are one hundred percent sound but they are factually as far from the instant case as bitter is from sweet or as Jupiter is from the earth. For example, in *Angel, et al., v. Schram*, 109 Fed. (2d) 380, it was pointed out that an actual controversy did not exist and that the question which the plaintiff sought to have decided had to do with certain departments of the Federal Government and that these departments would not be bound by any decision which the court might render. Likewise in *Ohio Cas. Ins. Co. v. Murphy*, 28 Fed. Supp. 252, it appeared that Murphy had only a nominal interest in the issue alleged to be in dispute and others who were not parties to the action and would not be bound by a judgment therein were the only ones actually concerned. *State Farm, etc. Ins. Co. v. Huges*, 32 Fed. Supp. 665, is on all-fours with the *Murphy* case, factually and in its decision, and so on down the list, in *Hoffman, Inc. v. Knitting Machines Corp., et al.*, 37 Fed Supp. 578, the court held that there "was justiciable controversy" and that the owner of the patent concerning which the controversy was alleged to pertain was not a party, and, of course, would not be affected by the outcome of the case if it were tried. In *Delno v. Market St. Ry. Co.*, 38 Fed. Supp. 341, a question was presented over which the California Railroad Commission had exclusive jurisdiction, and it is said "nothing which the Federal Court might have decided would settle the entire controversy." The other case cited by appellee in support of its assertion that the Federal District Court had discretion in the instant case to dismiss Count I, was one in which

a suit was pending in the state court and judgment had been rendered involving the very controversial question presented to the Federal Court. It was said that Federal Courts should not entertain such suits under these circumstances. This case is *Aetna Cas. & Sur. Co. v. Quarles*, 92 Fed. (2d) 321. The *Quarles* case does not contain even one morsel of aid and comfort for appellee, and it, like *Zenie Bros. v. Miskend*, *supra*, points out that 28 N. S. C. A. Sec. 400 (3) provides that if the issues raised in a suit of this nature are legal, they "must be tried at law if either party insists upon it," and it declares that the right to "a jury trial in an action at law may not be denied a litigant", and that this right must be protected in a suit for declaratory relief.

As has been shown, in the other six cases no controversy existed or a decision of the federal district court, if rendered, could not have finally settled the controversy and would not have bound the court or Board which, under the law, must have finally passed upon it. Not of lesser importance is the fact that the *Aetna Casualty, etc.* decision punctures appellee's conception of the discretionary latitude permitted federal trial courts in picking and choosing cases to be heard under the Declaratory Judgment Act. The opinion declares:

"It is said by Judge Knight in the case of *Automotive Equipment v. Trico Products Corporation* however that the discretion to grant or refuse declaratory relief is a judicial discretion and must find its basis in good reasoning and is subject to an appellant review in proper cases. We think that the discretion should be liberally exercised to effectuate the purpose of the statute and thereby found relief from uncertainty and insecurity with respect to the statutes and other legal relations. See Borchard Declaratory Judgments, page 101."

Again it is said:

"The statute providing for declaratory judgments meets a real need and should be liberally construed to accomplish proper intent, i.e., to furnish a speedy and inexpensive method of adjudicating legal disputes without invoking coercive remedies of the old procedures and settle legal rights and remove uncertainties and insecurity from legal relationship without awaiting a violation of the right or a disturbance of the relationship. Whether the remedy shall be accorded to the one who petitions for it is a matter resting in the profound discretion of the trial court to be reasonably exercised in furtherance of the purpose of the statute."

(To the same effect is *Zenic Bros. v. Miskend*, 10 Fed. Supp. 779.)

It thus appears that we need look no further than the cases cited by appellee for authority which reveals that its claims set forth on pages 23 to 27 inclusive of its brief are contrary to the law. These claims concerning the instant case are that a declaratory judgment would not have provided "a full or complete determination of all issues between the parties" because "any obligation to sell the castings in the wells was not specifically enforceable," "and any determination of whether appellant was entitled to damages" and "the amount of damages if any would have required further litigation." None of the foregoing decisions decide or discuss either of these matters, but they do definitely and unequivocally hold that having given a

judgment declaring the rights of the parties, the court has power to and must grant whatever further relief is warranted, legal or equitable, including damages and a jury trial, if either party demands it. Appellee persists throughout in the error of referring to the contract as creating an obligation "to sell," whereas as we have shown, the sale of the well casings was completed, the entire consideration was paid, and by Count I, the court was asked to so adjudge. Not permitting ourselves to overlook any decision cited by appellee attention is directed to *Mutual Life Ins. Co. v. Brannen*, 31 Fed. Supp. 123, which appellee refers to in support of the claim that Judge Hollzer properly gave consideration to the affidavit of H. H. Kelly in passing upon the motion to dismiss. The decision so holds and also it recognized that if the court had denied the motion and tried the case a jury trial might have been required and damages awarded. This was apparently the factor which persuaded the court to dismiss the case because it was said no jury would be in attendance for several months and suits on the same controverted matters were pending in a state court where an earlier jury trial could be had. It is apparent that appellee's purpose in calling attention to this decision is to justify the action of the trial court by which it gave consideration to the affidavit of H. H. Kelly. The cited case is valueless for its intended use because the facts stated therein show that the affidavit merely sustained plaintiff's averment in the first count that an actual present controversy then existed, which, of course, is one of the facts which must be shown to make out a case for declaratory relief.

**Appellee's Theory That Where the Plaintiff's Cause of Action Has Fully Accrued a Declaratory Judgment Will Not Be Rendered Is Both Untenable and Inapplicable.**

Appellee's final theory in support of the validity of the court's order by which the declaratory relief count was dismissed is that the Judge concluded that "if" the written contract included the casings in the wells "appellant's remedy was limited to damages; that this remedy is primarily consequential relief and is not relief for which an action may be maintained seeking a declaratory judgment. Five decisions are cited as sustaining this theory. Before discussing them we digress to point out that in the case last above mentioned, *Mutual Life Ins. Co. v. Brannen*, *supra*, the situation was precisely the same as that depicted by appellee as above set forth, but in the *Mutual Life Ins. Co.* opinion the court stoutly asserted that a proper case for declaratory relief was shown. Thus, once again, a decision vouched for as sound by appellee, strikes back and refutes one of the doctrines upon which the reply brief relies. We return to the list of five decisions, the first of which is one with which we are already well acquainted, to-wit, *Deeno v. Market, etc. Co.*, 38 Fed. Supp. 341. This decision contains not one word opposite to the proposition above set forth. The sole reason assigned for the dismissal of the case was that the California Railroad Commission had exclusive jurisdiction over the controversy, and that a federal court has no power to interfere with the orders of that commission; hence a declaration of the rights of the parties by the federal court would "not settle the entire controversy" and it would therefore be "improper for the federal court to accept jurisdiction."

The question arises, why has not appellee quoted some language from this and other if its counsel regard them as worth citing rather than leaving it to the court and appellant's counsel to make a microscopic examination of every case in search of some excuse for their use apparently taken at random and which, at the end of the inspection leaves the analyst still in the dark as to why the cases were cited.

Turning now to the other four cases cited by appellee, all California state decisions, it will be seen that they are not in point. Apparently appellee claims that the proposition which they decide is that under the California Declaratory law if the controversy only concerns obligations of parties resulting from a cause of action which has fully accrued, it is not within the purview of said law. Appellee cites these cases:

*Brix v. People's Mutual Life Co.*, 2 Cal. (2d) 446;

*Standard Brand, etc., v. Bryce*, 1 Cal. (2d) 718;

*Orloff v. Met. Tr. Co.*, 17 Cal. (2d) 484;

*Fritz v. Superior Court*, 18 Cal. App. (2d) 232.

This legal proposition, even if it were established, under the California law would be unimportant because under the Federal Declaratory Judgments Act the federal decisions have not recognized this irrational limitation on the court's power.

Secondly, the facts of the instant case exclude it from the rule stated by appellee.

In this case the controversy was and is a *continuing one, not pertaining to relief but concerning the rights of the parties*. Hence the principle of law announced in the foregoing decisions, even if it were settled law and interest-

ing to contemplate, can be of no aid in deciding whether the trial court abused its discretion in dismissing appellant's Declaratory relief count in the instant case. It is believed that opposing counsel have misconceived the purport of the rule upon which they rely and it will be seen that the decisions cited by appellee do not warrant its interpretation of them.

In the *Fritz* case the court was asked to determine the validity of an election of certain persons as officers in a corporation. The pleadings showed that since the election in question a new set of officers had been chosen, hence it was said, "No such controversy exists or could exist under the factor pleaded." Also it was held that the trial court was warranted in dismissing the action because Section 315 of the Civil Code expressly provides a special remedy for the determination of election contests. Still a third reason given for dismissing the action is, the opinion states, that the question of the validity of the election was "moot".

Each of the grounds above named have been held to warrant the dismissal of a suit for declaratory relief under the Federal Declaratory Judgments Act. (See *Uhlingers Federal Practice*, Vol. 3, pp. 751, 773.)

The nearest that the *Fritz* decision comes to upholding the rule contended for by appellee is that the opinion states that the cause of action had "already accrued and the only question for determination is the liability or relief for or to which the respective parties are charged." This is far from saying that declaratory relief cannot be granted because of the mere fact that "the cause of action has already accrued and other California cases have upheld declaratory judgments wherein the cause of action had

accrued.” (See *Strong v. Hancock*, 201 Cal. 550, and *Brix v. People's Mutual Life Ins. Co.*, *supra*). Hence, the court of appeal could hardly have intended to announce that the California Declaratory Judgments Act does not include within its purview any actual controversy concerning rights or titles if based upon transactions which have already transpired.

In the *Brix* case the trial court had rendered a judgment for the plaintiff of \$1,300.00 for monthly indemnity payments as provided by an accident insurance policy because of total and continuous disability, and which payment the insurance company had failed to make. The trial court also adjudged that the defendant pay the plaintiff \$100.00 per month beginning at a certain date, “during the rest and remainder of the plaintiff’s natural life.” The first portion of the judgment was upheld, *although the cause of action “accrued” four months before the action was begun*, and the suit was for declaratory relief.

The controversy concerning the plaintiff’s right to monthly payments then due and the refusal and failure of the insurance company to pay were (as was the plaintiff’s right to the oil casings, and defendant’s refusal to permit plaintiff to remove them in this case), actual and continuing issues.

In the *Fritz* case it was held error to award the plaintiff \$100 for the rest of his life, because these installments *had not accrued and might never accrue*. It was said:

“In the present action the breach of the contract was the failure of the defendant to pay the accrued installments. This default in the payment of these accrued installments did not work a breach of the entire contract, ‘the contract still subsists as to future benefits, and the default only affects the rights of the parties



as to benefits accrued. It is obvious that it does not work a breach as to future benefits, since, as to such, the liability of the defendant has not become fixed, but remains contingent upon the condition of the plaintiff being such as to entitle him to demand them'." (Robinson v. Exempt Fire Co., 103 Cal. 1, 3 (36 Pac. 955, 42 Am. St. Rep. 93, 24 L. R. A. 715).)

Instead of holding as appellee claims this case refutes its theory.

In *Orloff v. Metropolitan Trust Company, supra*, the gist of the action and the alleged violation of plaintiff's rights out of which the matters and relief sought by the various counts grew, was conspiracy between certain of the defendants to avoid the payment of a claim belonging to Orloff by assignment, and which, according to escrow instructions, should have been paid to his assignor out of money held in escrow. In the count seeking declaratory relief the plaintiff merely asked the court to review these facts and award him a judgment for \$2,500.00. Without stating any reasons or ground the Supreme Court concludes: "These allegations do not measure up to the requirements of an action for declaratory relief.", and the opinion adds that the refusal to entertain a complaint for declaratory relief is discretionary and will only be reviewed for abuse of discretion.

The real basis of this decision is not made clear. It is plain that, if the complaint alleged no more facts than the opinion recites, the count lacked any allegations to show that there was any controversy except as to the form of relief and it would surely be no abuse of discretion for a court to refuse to entertain a case of that type. The remaining California cases cited by appellee on

this issue is *Standard Brands of California v. Bryce*, 1 Cal. (2d) 718. The plaintiff's complaint showed affirmatively that a tort had been committed upon the real property of Bryce. As to this there was no controversy. It alleged that the defendants, Barrett and Hilp, building contractors, were liable and that Bryce was not liable, and asked the court to decide the rights and duties of the parties. The opinion in the case states (1 Cal. (2d), p. 721, beginning line 14):

"The only distinction between the action as stated by the plaintiff and the action as it would have been stated had the defendant sued, is, as noted, that the person claimed to have caused the injury, instead of the owners of the property claimed to have been injured, is suing as the plaintiff. The action is now, therefore, declaratory in character, but in fact presents essentially the same issues which would be involved upon a determination of the cause of action which the complaint shows has already accrued, viz., the liability of the respective parties by reason of the acts and conduct claimed to have caused the injuries."

It is a familiar rule that every decision must be appraised by the facts of the case. One fact which may well have had weight was that Bruce was not a party to the contract between plaintiff and the contractors, which contract was decisive of the question in controversy, to-wit: which of the contracting parties was liable? A second matter was that if it had been held that this was a proper case for declaratory relief the plaintiff would have succeeded in litigating the matter in the county of its residence rather than in the county where the real property was located. The opinion states:

"Consequently the plaintiff, by bringing the action itself in anticipation of the defendant Bryce's claim

against it, and by joining other defendants upon whom it attempts to fasten the claimed liability and who reside in a county outside the county where the real property is situated, may not deprive the owners of the property of their right to a trial in the county where the real property is located. The plaintiff may not, by this device, choose its own forum and thus evade the statutory provisions which require a trial in Los Angeles County of any cause of action shown by the complaint to have accrued."

In view of these considerations it is plain that the court felt justified in upholding the trial court decision in dismissing the action and in doing so used language which is susceptible of an interpretation not in harmony with any other California decision or with authorities elsewhere. The court cites

12 *A. L. R.* 74-76;

50 *A. L. R.* 43, 44;

68 *A. L. R.* 119.

These notes fail, entirely, to sustain the text of the opinion pages 74, 76, 12 *A. L. R.* digest English causes only and do not mention the subject, nor do the other *A. L. R.* articles cited.

As previously pointed out, if the California Declaratory Judgments Act does not contemplate relief which is merely determinative of duties and liabilities of parties to a transaction already ended, this is of no moment in the instant case because:

1. This case was tried under the Federal law which does contemplate that exact situation, and includes just such cases among those in which declaratory relief may be granted.

2. In the instant case the transaction had not ended although Ferer & Sons might have instituted an action to quiet title, or a claim and delivery suit or have claimed damages for breach of contract. Yet the actual controversy pertained primarily to the rights of the parties and the question of liability was a secondary issue, and it was alleged that the defendant threatened to commit a further and continuing violation of the written contract in that it would prevent Ferer & Sons from removing the well casings which the contract had conveyed to the plaintiff. The court was called upon to construe the contract and determine the rights of the parties thereunder while the transaction was yet unfinished.

### **The Federal Law.**

Ohlinger says: "However, it is clearly established that the authority of the court extends to declaration of *liabilities*. The Aetna case was reversed by the Supreme Court in *Aetna Life Ins. Co. v. Haworth*, (1937) 300 U. S. 227." (Emphasis added.) The author points out that in *Columbian Nat'l Life Ins. Co. v. Foulke*, 89 Fed. (2d), 261, 263, in passing on this question, said that "plaintiff's right to be immune from the claim of the defendant . . . is a 'right' which it may petition to have declared by the terms of Section 274-d (U. S. C. 28:400." To the same effect are *Farm Bureau, etc. Co. v. Daniel*, 92 Fed. (2d) 838 and *Am. M. Ins. Co. v. Busch* (D. C. Cal.) 22 Fed. Supp. 72.

Another line of Federal decisions refute the rule in the *Bryce* case as appellee construes it. These cases follow U. S. C. 28:400 (1), and the more specific provision of the Federal Rules of Civil Procedure which provides that "the existence of another adequate remedy does not pre-

clude a judgment for declaratory relief." The statute, itself, provides that the court has power to entertain a case, and declare the rights and duties of the parties, "whether or not further relief is or could be prayed," and in *Stephenson v. Equitable Life Assur. Soc.* 92 Fed. (2d) 406 this provision was construed as definitely authorizing the determination of rights and obligations which had fully accrued and for which an ordinary civil suit was maintainable. To the same effect are *Columbian Nat. Life Ins. Co. v. Foulke*, 89 Fed. (2d) 261 and *Zenie Bros. v. Meskend*, 10 Fed. Supp. 779. However, the Federal Rule above quoted speaks for itself and renders incontrovertible the power of the court to take jurisdiction in cases where the cause of action has fully accrued and the subject matter of the complaint shows that one or more other adequate remedies exist, and to determine the obligations and liabilities of the parties. Appellee's theory to the contrary is undoubtedly its trump card in the attempt to uphold the validity of the trial court's order by which the Declaratory Relief count was dismissed. It is believed that said theory has been shown to be untenable upon several legal grounds, and also that the factual situation presented herein removes it from the realm of the supposed rule. More space has been devoted to the matter than would ordinarily be desired or justified but this has seemed necessary as a result of the indefinite and incomplete manner in which the issue is presented the opposing brief.

III.

**The Error and Abuse of Discretion Pointed Out Under the Last Caption, by Which the First Count of the Amended Complaint Was Dismissed Affected Prejudicially Appellant's Substantial Rights.**

Opposing counsel put forth the claim that any error by the court below in sustaining the motion to dismiss was merely "formal or technical" error and does not affect the substantial rights of appellant, citing cases to show that such a rule exists and leaving to opposing counsel and the court to discover how said rule applies to the facts of this case. Such applicability of the rule may be, as appellee's brief says, "apparent" to it and its attorneys, but it seems mere probability that failure to point out, at least briefly, how and why error is not prejudiced, indicates that the task is difficult or insuperable. The error and abuse of discretion resulted in prejudice to the plaintiff in one outstanding respect, to-wit: had the motion been properly denied the findings of fact made later would necessarily have included a finding as to whether the parties to the written contract had ever previously entered into an agreement, oral or written, embodying the terms which the court, without legal authority added thereto by its decree, and which finding, as pointed out in appellant's opening brief, the court failed and wholly omitted in rendering its judgment herein. Again, had the motion to dismiss been denied, as shown in the opening brief, it was then established that no prior agreement was entered into between the parties, the motion for summary judgment, made and considered concurrently said motion to dismiss could not consistently have been denied. These motions should have been determined upon the record as made up

by the pleadings, affidavits and depositions pertaining thereto, and upon that record the motion for summary judgment must necessarily have been granted upon the various grounds set forth in the opening brief, all of which appellee's brief passes by without attempt at refutation. In granting the motion to dismiss count I the court considered and partly rested its decision upon an affidavit of H. H. Kelly, filed in opposition to appellant's motion for summary judgment. These two records were, therefore, merged in deciding the motion to dismiss. Hence the court must then have been aware that no prior agreement had been established and appellant's substantial rights were prejudiced by the failure of the court to so find and to have thus avoided the necessity of the subsequent trial and the delay incident thereto. The continued presence in the case, even if action upon the motions for summary judgment and to dismiss had been delayed, would have kept the court conscious of the issues presented by them and all of the findings to be made and, as shown in the opening brief, proper decisions on these motions were interdependent; but the court did not grant the motion for summary judgment and granted the motion to dismiss the declaratory relief count, and thus wiped the slate clean as to the cause of action therein set forth.

The prejudice to Ferer & Sons in this behalf is both specific and general, but the foregoing we believe suffices, especially in the absence of any attempt by opposing counsel to elucidate his proposition, to show prejudice to appellant by the improper dismissal of count I.

IV.

**The Court Failed to Find That the Alleged Prior Agreement Excluded the Casings From the Sale.**

Appellee asserts that finding 3 constitutes a finding of the terms of the alleged prior agreement, or, at least that with the aid of findings 4 and 5 that findings is evolved. Whether or not a prior agreement was ever entered into is a major issue in this case. Indeed, it is pivotal and determinative of the court's power to decree reformation. Appellant insists that no finding upon this question is made in finding 3, and that findings 4 and 5 cannot and do not supply the requirement. Appellee avers that finding 3 has not been challenged by appellant although practically all other findings have been attacked by it. The first portion of this statement is erroneous. The opening brief, pages 82 and 83, challenge finding 3 as a finding of ultimate facts which is invalidated by the fact that the specific evidentiary findings on the same matter do not support finding 3. On page 108 it is pointed out that finding 3 is one of those pertaining to the intentions of both parties—an ultimate fact, which has no support in the evidentiary findings or the evidence. Of course, findings of ultimate facts are merely general findings and if special findings are made general findings are superfluous. The Federal Rules of Civil Procedure (Rule 2.1.1) directs that "In all actions tried upon the facts without a jury, the court shall find the facts specially," etc., and by Rule 2.1.3 it is provided that requests for findings are not necessary for purpose of review. Finding 3 states that prior to January 17, 1941 (the date of the written contract), the seller and the buyer "made an agreement of sale," etc. Appellee must concede that thus far the find-



ing is general and, standing alone, is a pure conclusion. The sentence proceeds: "for the sale, for the sum of twenty-two thousand dollars (\$22,000.00) special as to price of certain refinery and producing facilities and equipment (general as to articles sold) located on land at Casmalia, California (special as to place) owned by defendant, (general as to articles), and plaintiff agreed, among other things, to perform at its sole cost and expense certain work in connection therewith . . . (special as to the seller's obligations). The equipment and facilities to be sold consisted of various pipe lines, boilers, buildings, pumps, tanks, motors, engines, and scrap metal scattered over the property (general as to articles sold). Various items of facilities and equipment were expressly excluded from the sale," (special). Then follows a list of excluded articles in which well casings are not included. It is certain that this finding does not show that the alleged prior agreement included oil well casings, and with respect to the finding which relate to the property being sold the finding violates Rule 2.1.1 in that it is most general and decidedly not special. Finding 4 reads: "To evidence such agreement, plaintiff and defendant executed a written contract dated January 17, 1941 [Plaintiff's Exhibit No. 4]." Appellee sees in this a clarification of finding 3. It speaks for itself, and, appellant contends, in that behalf, it is meaningless. Finding 5 reads: "The written contract dated January 17, 1941, did not truly express the agreement or the intention of plaintiff and defendant in that it did not expressly provide (1) that the subject matter of the sale did not include the casing in any of the oil wells located on the land; and (2) that the plaintiff had no obligation, as part of the work plaintiff agreed to perform under such con-

tract, to abandon such oil wells or dismantle or remove or dispose of the casing contained therein.” Opposing counsel say: “It is not apparent how a trial court could frame clearer findings of a prior agreement” than are contained in findings 3, 4 and 5. The answer is obvious. It could have added the oil casings to the list of items expressly excluded, according to finding 3, in the agreement alleged therein to have been made prior to January 17, 1941, and in like manner it could have found that by said prior agreement it was stipulated and agreed that plaintiff had “no obligation as a part of the work plaintiff agreed to perform under such contract to abandon such wells or to dismantle or remove or dispose of the casing contained therein.” The simplicity with which a finding that the prior *agreement* to exclude the casings from the sale, might have been set forth makes it almost naive to assert, in effect, that by *an entire lack* of findings of such *agreement* the court actually finds the lack thereof to be a fact and as clearly as the English language could be made to do when employed by the counsel who drafted the findings and the trial judge who approved and signed them. The situation is reminiscent of a statement accredited to Mark Twain who philosophized that the stinger of a bee only extends a quarter of an inch and the other two feet is the victim’s imagination. The instant finding that the written contract does not truly express the agreement or the intention of the parties because it omitted certain provisions, and absent a finding that the prior agreement contained a stipulation that oil casings were excluded from the sale, does not extend even “a quarter of an inch” in the direction of becoming the absent finding. It is definitely true, as appellee’s brief reasons and states that “the court below was aware of and rejected the argument made

to it by appellant that there was no oral agreement," and this fact itself, and the certainty that the court below must have known that a finding of facts which merely indicates that to make a written contract conform to a prior agreement and actual intention of the parties it is necessary to reform the written contract and exclude the casings is not a finding that the prior contract excluded the casings. This is, in substance and effect, the meaning of finding 5, and a finding to the same effect was held insufficient to show the terms of the prior agreement in *Auerbach v. Healy*, 174 Cal. 60, where reformation was sought. Hence the omission in Finding 3 from the list of excluded items was not a mere oversight or an inadvertent misuse of language, similar to that assertedly made by Mr. Paradise in drafting the contract and sale agreement dated January 17, 1941. The law as announced in the cases quoted and cited in appellant's opening brief has not been disclaimed or overruled by later decisions. It is still universally recognized that to state a cause of action for reformation on the ground of mutual mistake or of mistake by one party which was known or suspected by the other facts must be set forth and show that the contracting parties "agreed upon a certain thing" which they stipulated should be embodied in their contract and that by mistake it was omitted. It was so held, citing ample authority, in *Harding v. Robinson*, 175 Cal. 534, and is so stated in the other authorities cited in appellant's opening brief, to none of which appellee has referred. It is also still the law as declared in *Auerbach v. Healy*, 174 Cal. 60 and *Nat'l Bank v. Ex. Nat'l Bank*, 186 Cal. 172 (Op. Br. p. 12), that to state a cause of action for reformation based on mistake *it is essential to plead and prove how the alleged mistake occurred*. This rule was recog-

nized, relying upon the Auerbach decision in *Carpenter v. Frolopp*, 30 Cal. App. (2d) 400, 408, in which the pleading met both of the above requirements.

It is equally well settled law that findings are required upon all facts which are essential to the plaintiffs' cause of action and that a fact which must be pleaded must be included in the findings. (24 Cal. Jur. p. 969.)

Hence the *Auerbach v. Healy*, *Harding v. Robinson*, *Nat'l Bank v. Ex. Nat'l Bank* and *Carpenter v. Froloff* decisions are applicable to findings as well as to pleadings and proof.

It is said in 24 California Jurisprudence (p. 964), that "while extreme accuracy of statement and minuteness of detail are not required, findings are insufficient if they merely tend to establish the fact in issue," citing cases, and also "the doctrine of implied findings which formerly prevailed is now abrogated." (24 Cal. Jur. 935, 974; 2 Cal. Jur. 876.)

These rules directly pertaining to the sufficiency of findings and precludes any substantial contention that finding 3 alone or conjoined with findings 4 and 5, find that the parties to the written contract herein stipulated in a prior agreement that well casings should be excluded from the sale. While opposing counsel at first say that Finding 3 alone contains this finding, the argument later made by them in effect concedes that this is not the case and that reliance is really placed on Finding 5. In fact, Finding 3 is devoid of any reference to casings but its language is in substance taken from the written contract and the trial court in its Memorandum of Conclusions construed the language of that instrument to include the casings in the sale.

It must, we believe, be conceded that the most which can reasonably be claimed for finding 5 is that it creates an inference that the prior agreement of sale did not include casings in the oil wells and that the facts found in finding 5 tends to indicate that such was a provision of the prior agreement.

It is certain that finding 5 does not directly or indirectly make any allegation concerning the terms of the prior alleged agreement.

As far as finding "how the mistake was made" the findings are entirely insufficient, although it is found that the defendant was not negligent, which finding, as shown in appellant's opening brief, is, directly contrary to the evidence provided by defendant's own witnesses.

Not all mutual mistakes permit the remedy of reformation of a written contract. Regardless of lack of negligence on the part of one or both parties, the requirement is laid down in the above named cases is that the pleading, and therefore the finding must affirmatively show how the mistake came to be made.

Under the authority of *Auerbach v. Healy, supra*, the language of finding 5 upon which appellee relies is a pure conclusion, and consequently is insufficient for any purpose.

For each of the reasons and upon all of the grounds above elucidated, appellant insists that the Court failed to find that the alleged prior agreement excluded the casings from the sale or contained the other provision which he mentioned in finding 5 which the decree added to the written contract.

V.

**Many Other Findings of Material Facts Are Contrary to the Evidence or Are Unsupported by the Evidence.**

This assignment has been covered in such great detail in appellant's opening brief (pp. 82-109) and in most respects is so inadequately met in appellee's reply brief that extended discussion herein would only require mere repetition.

However, certain statements and contention by appellee merit our reply.

Appellee first quotes several decisions to the effect that an appellant court "does not weigh the evidence" in cases of this type; that "a mere conflict of testimony as to a mistake \* \* \* does not necessitate a denial of relief" and that the reviewing court only seeks to determine *whether there is substantial evidence in support of findings*.

These are principles which every lawyer knows and even the decisions where judgments have been reversed on the ground that the evidence was insufficient to support the findings or contrary thereto, often have set forth these very general rules, but have disregarded them because they were inapplicable to the record involved. This is the situation in the instant case.

Without repeating, it is pointed out that a mere reading of the discussion of the findings in the opening brief will show that in almost every instance the attack is based upon the ground that there is *no substantial evidence* to support the finding or that such evidence is inherently improbable or unbelievable. In that behalf it is frequently shown that an inference upon which the court rested its

finding cannot legally be drawn because there is no logical connection between the factual basis and the conclusion.

A majority of the evidentiary finding are of this type. Others are not true findings, being bald conclusions, others which are challenged are inherently unbelievable, improbable or irrational.

The reply brief seeks to avoid the necessity of performing the impossible task of refuting appellants' analysis and dissection of the evidence which pertains to finding 8, by quoting from the opening brief the statement, "There is some testimony in support of this finding," and asserts: "This acknowledgement is of itself sufficient to dispose of appellant's attack in view of the authorities cited above concerning the conclusiveness of findings of a trial court supported by *substantial evidence*." (Italics ours.)

It is plain that appellant's said "acknowledgement" does not contain the word "substantial," and no authority which appellee cites holds that unsubstantial testimony or inherently improbable, unbelievable or irrational testimony is immune from attack on appeal from insufficiency to support findings.

Appellant avows at this time that if the testimony which Finding 8 relies upon can fairly and logically be classed as substantial evidence, it was the right of the court to accept it. However, even in that event appellant will, as it did in the opening brief, contend that such testimony does not permit the inference which constitutes the findings.

Appellee criticizes appellant's citation of *Menning v. Sourisseau*, 128 Cal. App. 635, as authority for the proposition that "every presumption to be invoked is in favor of the correctness of the written instrument and against the alleged prior agreement"

and declares, "The appellate court rejected such contention as a basis for reversal" and quotes from the opinion to that effect. The quoted portion of the opinion [Rep. Br. p. 37] makes it clear that said rejection was based on Section 1844, Code of Civil Procedure, which provides, "The direct evidence of one witness who is entitled to full credit is sufficient for the proof of any fact in civil cases." This law, plus the fact that neither the character of the testimony given by the witness, nor any other evidence tended to deprive the witness of "full credit," amply warranted the decision and was the basis thereof. Obviously, if, as in the instant case, as shown in the opening brief (pp. 85-94) it had appeared that the witnesses whose testimony was relied upon as support for findings 8 and 9, *were not "entitled to full credit,"* the judgment in the *Mcnnig* case would have been reversed.

Pages 38 to 42 of Appellee's brief is devoted to an inadequate discussion of appellant's attack upon Finding 8. It is inadequate because it has selected merely a small portion of appellant's argument, torn from the context which is thus shorn of its meaning and effect. Hence, except for one matter, our elucidation of this issue in the opening brief is relied upon as an answer to what appellee has set forth. Appellee points out that the witnesses Montgomery and Kelly gave some information concerning the "management" of the Richfield Corporation, although the opening brief asserts that no evidence shows "what person or group of persons constituted management." It is true that the particular statement quoted from the opening brief is too broad, but the main point which that statement concerns and which was stressed therein, still remains unchallenged which as stated in our opening brief is: The record contains no competent evidence to show



that Richfield Corporation had any intent except as shown by the written instrument and nothing in Finding 8 tends to show a different intent on the part of Richfield, and this necessarily is true because neither by the testimony of Montgomery "nor by that of any other witness did the defendant show that this so-called executive group ever took any action or officially formed or expressed any intent whatsoever." (Op. Br. pp. 91, 92.) Also it was said and shown in the opening brief, by the testimony of various defense witnesses, "management" alone had authority to speak for Richfield (Op. Br. p. 91), and no witness testified that "management" gave any instructions to Davis, Kelly or Montgomery to exclude casings from the sale or officially formed or had an intent to that effect." (Op. Br. p. 94.)

Kelly did say that in August, 1940, a discussion about whether it would be advisable to remove from the derricks the tubing and sucker rods because they were worn out was had "in the meeting at a period after the Anderson contract was executed [Tr. p. 330]; and that those who attended were: the president, Mr. Jones, "three vice presidents, Mr. Morgan, Mr. A. M. Kelly and there was Mr. Montgomery and Mr. Autrey and Mr. Dinkins and Mr. Ragland, and I think that is all," and these persons were "all heads of their respective departments." [Tr. p. 331.]

Kelly further said: Meetings are held regularly one every week, and that "to a large extent" policies of the corporation are determined at said meetings [Tr. pp. 331, 332]. Mr. Montgomery testified that he attends "the executive meetings of Richfield" held once a week and "the president of company and its executive heads" are present at those meetings [Tr. p. 467]; and he said that

at a meeting prior to the time when the tubing and rods were removed from the wells at Casmalia he recommended that this equipment should be removed [Tr. pp. 467, 468].

Appellee's correction is thus acknowledged, and full credit is accorded to the appellee for the fact that it is in the record.

However, it is wholly immaterial to any issue in the case that certain persons and officers of the company habitually attend these executive meetings and "to a large extent" determine policies of the corporation, since there is a total lack of any evidence, testamentary or documentary, that at any executive meeting this executive body ever took any action by resolution, motion or otherwise, pertaining to the selling or retaining of oil well casings or, for that matter, concerning any other question having to do with the transaction with Ferer & Sons; said testimony means nothing in this case in the absence of testimony of some witness that at some executive meeting of this committee or board, some official action was taken by which its intent was formulated, expressed and made known, at least to those present. It is highly significant that in response to appellant's challenge to appellee (Op. Br. p. 92), to point out evidence which shows one or all of the essential facts, without which there could not be and has not been produced any proof that the Richfield Corporation did not intend to sell the casings, the only answer or defense made is by way of pointing out the immaterial and comparatively trivial testimony of Kelly and Montgomery which showed who attended the executive meetings and that they were held regularly and to a large extent determined the policies of the corporation.

Indeed, to stop at this point amounts to a confession that this executive group never determined that the casings should not be sold, and verifies the presumption that since corporation executives who attended these meetings caused the written contract to be executed by which the casings were sold, such was the policy and intent of this committee or board, if any it had, and therefore, such was the intent of the Richfield Corporation.

**Findings 11, 12, 13, 14, 16, 17 and 21.**

Appellee's attitude and procedure in reference to briefing the issues presented by appellant concerning the above named findings is puzzling. The reply brief (p. 43) reads:

"Appellant's brief states that the facts covered by such findings have been discussed in the portion of appellant's brief devoted to the motion for summary judgment, and would be repeated. But that portion of appellant's brief necessarily was limited to a discussion of the evidence before the court at the hearing on the motion, to-wit, the affidavits and depositions, and did not discuss the testimony and evidence presented to the court at the trial. Appellant has the duty, in challenging the findings, to point out to this Court the failure or absence of substantial evidence supporting such finding. Appellant wholly fails in such duty and disregards completely all of the testimony and evidence presented to the Court in a trial which occupied several court days. Inasmuch as appellant's attack is so meager, no effort will here be made to prove the sufficiency of each of such findings by references to the testimony and evidence presented to the court at the trial."

The statement which appears in appellant's opening brief to which the foregoing refers will be quoted, from which it is obvious that appellee's statement distorts and unfairly represents appellant's treatment of the above enumerated findings. In that behalf the opening brief reads:

"Under Caption I appellant has discussed facts found in Findings 11, 12, 13, 14, 16, 17 and 21 as they relate to the court's order denying plaintiff's motion for summary judgment. The affidavits and depositions of the witnesses for both sides were reviewed and analyzed and it was shown that according to the affidavit of Mr. Davis, McGahan had no authority to conduct any negotiations for this sale and that Davis had exclusive jurisdiction of negotiating the sale. It was pointed out that therefore, neither Ferer nor Clements was charged with the notice of anything which McGahan may have said. Also, it was shown that the testimony of Clements and Ferer to the effect that their intent was as expressed in the executed contract, and that said affidavits and depositions contained no substantial evidence tending in any way to belie their testimony but does reveal much in consonance therewith. Insofar as the facts set forth in the above group of findings is concerned the testimony of the same deponents which was given by them at the trial adds nothing to the materiality of said facts and sheds no new light upon them to give them greater or different meaning. Therefore, in the interests of brevity, which appellant is compelled to regard, further elucidation of said facts will be omitted."

An inspection of these findings shows that appellant pointed out the grounds upon which it was claimed that said evidentiary findings contained no facts which were

binding on plaintiff or which constituted notice to Ferer or Clements of anything said by Davis or McGahan.

Appellant denies that it has failed to perform its duty to point out the testimony and evidence from which it appears that said findings are without support therein.

Finding 11 is that on January 8th Harold Davis said to Clements and Ferer that defendant intended to use the wells on the Casmalia property for future production of oil and for that reason declined to include six large storage tanks in the sale.

Finding 12 is that between January 8th, 1941, and execution of the written contract, Harold Davis pointed out to Ferer and Clements on a map a certain gas line from an oil well to the superintendent's house and stated that defendant desired to exclude it from the sale, and that it might be necessary to exclude other gas lines, if the gas from said line was not sufficient to serve said house; that plaintiff did not know the number of wells to which gas lines extended when the contract was executed and that it excepts from the items sold gas pipe lines connecting wells to said house, which exception is also shown on a map attached to said contract.

Finding 13, is that prior to the execution of the written contract, Clements became associated with plaintiff in carrying out said contract and acquire a 1/3 interest in the profits and agreed to pay 1/3 of losses if any, and during negotiations prior to the execution of the contract McGahan said to Clements that the facilities and equipment which defendants proposed to sell were "surface equipment."

Finding 14 is that during the said negotiations, McGahan stated to Ferer that the equipment to be sold

was "surface equipment" and that McGahan had no inventory but would meet Ferer on the premises and point out the particular property proposed to be sold.

Finding 16 states that David Zeidenfeld was in the employ of plaintiff throughout said negotiations and when the contract was executed; that during the period of negotiations Zeidenfeld was told by McGahan that defendant proposed to sell certain equipment and facilities at Casmalia and that it would comprise "surface equipment," and would weigh about 1500 tons and that its nature and quantity could be ascertained by inspection; that later, on the evening of this conversation, Zeidenfeld reported to Ferer that defendant's estimate of the weight of the equipment was roughly 1500 tons, of which 900 tons was pipe and 600 tons was steel, which conversation was prior to plaintiff's written offer of December 10, 1940.

Finding 17 is that after the above found report to Ferer by Zeidenfeld, Zeidenfeld told Ferer that plaintiff, if interested, would have to bid somewhere in the amount of \$20,000, and this conversation was prior to the date of said offer.

In another portion of appellant's opening brief the affidavits and depositions of all witnesses who testified to facts pertaining to the matters covered by these findings had been analyzed and discussed in great detail. This elucidation comprises pages 35 to 75 inclusive, and is under Caption I. Everything which could be said opposite to Findings 11, 12, 13, 14, 16 and 17 is set forth in the survey and analysis of the affidavits and depositions of McGahan, Kelly, Davis and Ferer (pp. 35-43), and of the depositions of Zeidenfeld, Clements and Ferer (pp. 55-75). The affidavits are brief and those of McGahan, Kelly,

Ferer and Davis concern, almost entirely, the testimony on which these findings are based, and the same is true of Zeidenfeld's deposition; the portions of the Ferer and Clement depositions which deal with conversations with McGahan and Davis are readily located, and the testimony of all of these witnesses is concisely set forth in the supplement to appellant's opening brief.

Hence, appellant believed, and now believes that to merely repeat what had been once painstakingly set forth could serve no good purpose other than to emphasize appellant's points and arguments and that, in the interest of brevity and court convenience the issues could be best presented by reference first presentation under the previous caption.

It is believed that the argument which the opening brief prepared with great care and much labor conclusively shows that each of this list of findings is either unsupported by or contrary to all of the competent, substantial evidence and that the course employed in the opening brief for presenting the points and contentions in that behalf was fair and proper.

Appellee confines its discussion of Findings 11 and the others of this group to a brief reply to appellant's argument to show that the facts found in said findings do not permit of inferences of any of the ultimate facts and especially that they do not charge plaintiff with knowledge that defendant did not intend to sell the casings or that defendant actually had the intention of retaining them.

In that behalf appellee apparently contends that the testimony concerning the McGahan conversations with Ferer, Clement and Zeidenfeld, even though incompetent, may be the basis of findings which in turn may support

ultimate findings because such testimony was admitted without objections by the defendants. Incompetent evidence is unsubstantial, and an appellate court is not bound by a determination of the lower court which is based on incompetent evidence. (*Estate of Platt*, 21 Cal. (2d) 343, 352; *Rilovich v. Raymond*, 20 Cal. App. (2d) 630.) In the last named case the Court of Appeal disregarded considerable testimony which it said was improperly received on the theory that the contract was ambiguous and the incompetent testimony was offered to dispel the uncertainty. But the Court of Appeal held that the contract was free from uncertainty or ambiguity and considered that the incompetent testimony could not affect its decision. The Supreme Court denied a petition for hearing and in its opinion in *Estae of Platt* cited the *Rilovich* case as authority on this point.

Therefore, appellant believes that the testimony of McGahan as to his statements pertaining to matters outside of the scope of his employment was entitled to no weight as the basis for any finding and should be disregarded on appeal. This principle and rule also excludes like statements by Kelly and representation to Zeidenfeld, who was unauthorized to represent Ferer & Sons in negotiating this contract. Surely statements made by one person to another, neither of whom have authority to represent their employer, cannot be binding upon or be taken advantage of by the employers for any purpose. This result follows, not merely because the law so holds, but for the sound reason upon which the law is based,



that representations made outside of the scope of the employee's employment cannot be any more dependable than similar assertions coming from a total stranger and in both instances the statements are hearsay which no one to whom their contents is impartial would be justified in giving credence.

### Finding 15.

Appellee asserts that "The common meaning of the phrase 'surfact equipment' had significance because of the knowledge and suspicion of Richfield's intention which McGahan's statements about 'surface equipment' gave to appellant."

Since, as the opening brief claims and shows, McGahan had no authority to negotiate a contract for defendant or to make any representations about the matter, those to whom they were made had no duty and no right to rely upon what he said any more than they would if the representations had emanated from Richfield's messenger boy. Appellee does not maintain that McGahan was authorized to contract for defendant or to carry on negotiations preliminary thereto. Without such authority statements by him concerning the deal could not bind his employer, and it necessarily follows that the employer cannot predicate liability upon others by reason of them.

We find nothing in appellee's arguments relative to Findings 18 which is not refuted in appellant's presentation of the issue in the opening brief. The same is true of appellee's discussion of finding 22.

### Finding 29.

This is the finding by which the Court absolves the defendant of all negligence in the instant transaction. Appellant's opening brief insists that this finding is definitely contrary to a mass of evidence and has no support in any evidence. It points out that it is grossly inconsistent with other findings in which the court determined that all of defendant's employes knew that the oil well casings were to be excluded from the sale, and yet Mr. Paradise drafted the contract which included the casings. He did so under directions from Kelly and Montgomery, so that either he or both of them were negligent in that matter. Both Kelly and Montgomery read the contract after it was drafted and Kelly executed it for the defendant, and their failure to require that the writing be so altered as to exclude the casings was undoubtedly negligent.

McGahan also read the contract before it was executed, and was negligent just as were the others. Davis and Kelly were both negligent in leaving out of the letter accepting Ferer's written offer, any provision excluding the casings, and this negligence was gross because the offer definitely included them. Montgomery gave Davis instructions as to the certain items to be excluded from the sale. He was negligent in not informing Davis that casings must be excluded, or else Davis was negligent in failing to follow such directions.

If all of the employees knew that the casings were to be excluded, it was gross negligence for none of them who contacted Ferer, or Clements (if, as the court found notice to Clements was notice to the defendant) to tell these men in plain language that the well casings were not to be sold,

and according to their own testimony neither McGahan, Davis or Kelly ever did so. Such conduct, appellant contends, was fraud and especially so because defendant's employees knew that plaintiff was a dealer in junk, and presumably would not be familiar with such a term as "surface equipment." According to said employees of defendant they had been told that only "surface equipment" was to be sold, yet everyone of them read the draft and Davis and Kelly read Ferer's offer, neither of which documents contained the term "surface equipment" and both of which specified "all equipment," yet none of those capable employees said or did anything to correct, what they were bound to know was a most serious error—if their own testimony is believed.

Appellant has stated, and again states, the picture thus presented makes a *prima facie* case of deliberate fraud perpetrated against the plaintiff. Opposing counsel were challenged in the opening brief (p. 105) to "produce an example of greater negligence in any business transaction."

They not only fail to meet the challenge but fail in their attempt to show anything in the record which serves to excuse or mitigate the foregoing gross negligence and apparent fraud. Their only response is a reference to certain cases, previously cited, which say that courts of appeal will not weigh evidence where there is "some" substantial testimony or other proof to sustain a finding; also an extended quotation from one decision to that effect and the citation of four decisions in all of which the only

mistake or negligence shown is called an "inadvertence" upon the part of one who failed to read, or read but failed to note, a provision in a writing which was not intended by him to be placed therein. The California cases are: *Los Angeles v. New Liverpool Co.*, 150 Cal. 21; *Sullivan v. Moorhead*, 99 Cal. 157; *Seim v. Cooper*, 79 Cal. App. 748. *Columbian Nat'l Ins. Co. v. Black*, 35 Fed. (2d) 571 is like the others factually and the decision is the same, except that instead of designating the mistake of the party who sought reformation as an "inadvertence," this decision says: The negligence, "if any consisting in not reading, line for line, the printed form, or of failure to notice" the word "endowment" at the bottom of the table of values. Comparison of these examples of "inadvertence" or "negligence, if any" with the conduct of defendant's employees in this case is left without further comment, but appellant believes that no case can be found where negligence such as that herein shown has not barred the party from the remedy of reformation of a written instrument. Appellee devotes a far greater space in an attempt to show that appellant was negligent than is used in its endeavor to palliate the conduct of defendants' employees. However, the trial judge failed to find that the plaintiff was guilty of any negligence and if it had been even grossly negligent, this would be wholly irrelevant to the issue and could not serve to sustain the unsupported Finding 29 which in effect declares that the defendant was free from negligence.

### Finding 30.

Appellee contends that no finding was required upon the interpretation of the written contract which was sought to be reformed, because, it is said "the relief of reformation granted to the appellee" rendered a finding on that matter unnecessary.

Appellee puts the "cart before the horse." Its counsel would have the judgment to be rendered support a preceding finding rather than require that the finding support the judgment. Had the court elsewhere found that the written agreement provides that the well casings are thereby sold to Ferer & Sons and that it was made its duty to abandon the wells and dismantle and remove the equipment a finding as to other portions and provisions might not have been required. However, the trial court failed to make such specific findings and to thus squarely repudiate its language to the contrary in its "Memorandum of Conclusions." Hence appellant insists that Finding 30 constitutes error.

VI.

**The Written Contract Dated January 17, 1941, Is Clear and Unambiguous and Transfers the Oil Well Casings to the Buyer. No Surrounding Circumstances Tend to Contradict It.**

Appellee's Caption V states a proposition directly to the contrary of the above assertions. In support and verification of the averment, that the written contract is clear and unambiguous and conveys the casings to the buyer, appellant believes that Judge Hollzer's "Memorandum of Conclusions" suffices to refute and expose the fallacies in appellee's argument. With that document in the record and a vital issue throughout, it is noteworthy and significant that appellee fails to mention it and makes no attempt to point out any particular in which Judge Hollzer's reasoning was unsound or any matter which he may have overlooked. Under "(a)" of appellee's brief, discussing this issue, much stress is placed upon the use of the word "on" in the term "on the land" as employed in the contract.

It is said in *Buruham v. Claiborne*, 107 La. 513, 32 S. W. 87, "The terms 'on' and 'upon' have an almost inexhaustible variety of meanings." (46 Cor. Jur. p. 1075.) In *Arbes v. Wheeling etc. R. Co.*, 33 Va. 1, 105 S. E. 14, 5 L. R. A. 371, it was held that "on" meant "below" when used in an act empowering municipalities to grant corporations the right to use public streets for and to construct railroads upon them, the issue being the right of such a corporation to cut a hill well below the street grade, and it was said that "on" did not mean "on the surface" in the statute involved. Appellee states that appellant's (Judge Hollzer's) interpretation of the con-

tract in this case would have read, "of equipment 'on and in and under the land.'"

In *Schmohi v. Travelers' Ins. Co.*, 177 S. W. 1108 (Me. a), it was determined that "on" imported "on and within," and this term has often been construed to include "under."

In *Schroeder v. State*, 162 N. E. 647 (Oh. a) it was held that "on" meant "attached to," which would clearly include all oil well equipment and facilities, among which are the casings.

It fairly appears from Words and Phrases that the meaning of the word "on" is determined by the context in which it is found, and it was by this means that the trial court arrived at the decision with which appellee disagrees.

(b) Appellee invokes the maxim, *expressio unius est exclusio alterino* without seeming to realize that the rule thereby stated provides an almost unanswerable reason for concluding that the oil well casings were *not* excluded from the sale. Perhaps, like the man at the foot of the mountain, close proximity to the picture hid from the view of opposing counsel the provision in the contract to which alone the maxim has direct and cogent application. The instant contract bears no resemblance to the agreement involved in *Althoff v. Althoff*, 123 Pac. 326 (Colo.). In that contract the provisions descriptive of the articles to be sold purports to enumerate the items, and contains no general provisions within which the property in suit could be classed. It begins, "The property proposed to be sold includes goodwill," and then follows a long list of items, and ends, "and all things in general and owned and used by said firm in the conduct of the business at #1411-15

Wazee Street.” The controversy arose over certain stock of some corporation value at \$16,000 which the plaintiff owned. It is obvious that such stock did not come within the portion of the enumeration last quoted and the court properly applied the maxim *expressio unius*, etc. On the other hand, the instant contract, in describing the property to be sold, begins “all of the equipment and facilities located on said land, together with,” etc., and then follows an enumeration of items, at the end of which comes a *second list which consists of items excepted from the sale.*

This second list is typical of the type to which the maxim *expressio unius est exclusio alterius* applies. The provisions concerning it reads: “It is expressly understood and agreed that the following items of equipment and facilities located on said land above described are excepted from the foregoing and shall not be included in said sale nor shall the same be dismantled or removed by the buyer.” Then follows nine items, and oil well casings were not among them. Although not naming the maxim, the Memorandum of Conclusions clearly shows that it was in the Court’s mind and that from it he deduced that since the well casings were not included in the specific enumeration of excepted items, it was intended to be sold. After reciting the substance of provision of the contract beginning: “seller covenants and agrees to sell buyer, subject to exceptions hereinafter provided, all of the equipment and facilities located on the land,” the Memorandum of Conclusions reads:

“It further appearing from the terms of said contract that the casing in the oil wells was not enumerated or described among the items of equipment and facilities thus expressly excepted from said sale; and



It further appearing from the terms of said contract that plaintiff agreed at its sole expense to perform certain work, and that such work should include, among other things, the dismantling, removal and disposition of ALL equipment and facilities to be purchased by them, also the filling in and leveling off of all ditches and pits created by their work in removing pipe or other equipment; also that in addition plaintiff should remove from said land ALL equipment, facilities AND OTHER PROPERTY located on said land, EXCEPTING ONLY the items expressly excluded under the provisions of paragraph one of said contract; also that all work to be performed by plaintiff should be performed in strict compliance with all rules, regulations and other requirements of the County of Santa Barbara, the State of California and of any other governmental authorities. The Memorandum, continuing, indicates that all inclusive language used in describing the property sold and the omission from the list of excluded items of well casings, were the two elements of the contract which led the Court to conclude:

The Court concludes that under the terms of said contract the defendant sold and conveyed to plaintiff the casing in the oil wells on defendant's land described in said contract. One other element might have been pointed out. It forever clinches the two upon which Judge Hollzer relied, among the items excepted are at least two which are not surface equipment or facilities. These are item "(b). That certain water pump," etc., and certain other pumps in "(i)."

Defendant's witnesses McGahan and Kelly testified that they were told that *all surface equipment* was to be sold and that they so informed plaintiff's employee Zeidenfeld,

Mr. Clements and Mr. Ferer. Appellee's brief repeatedly makes much capital of this testimony, yet the contract excepts items of this character, which, of course, would not have been done or thought of by defendant if they believed that no surface equipment or facilities were included in the provision, "all of the equipment and facilities," which initiates the description of the property to be sold. Indeed, appellant does "seriously" assert that the contract is clear and unambiguous in its inclusion of the casing among the items of property which were sold to it. Appellee's reason "(c)" (Rep. Br. p. 60), is easily eliminated. Gas could be taken from the wells even if the casings were removed. Appellee concludes: Such ambiguities, contradictions and repugnancies would result if the contract should be interpreted to include the casings, permit parol evidence of surrounding circumstances and the intention of the parties. The only ambiguity which appellee mentions is attempted to be shown in the above mentioned "(c)" and its brief fails to point out any ambiguities or contradictions. Hence no case is made out warranting evidence to explain the terms of the contract. It is true, as appellee reputedly asserts, that such evidence was received, at least principally without objections by plaintiff's counsel, but this fact cannot change its quality and make believable, substantial competent evidence from that which, if received over objections, would have been inherently incredible, improbable, unbelievable, and therefore not substantial evidence. Appellee's statement on page 62 of its brief wherein it purports to state the grounds assigned by appellant before the trial court for the contention that the contract included the casings in the sale consists of child-like distortion. At all times during this litigation the appellant has based its said contention

upon the identical grounds which Judge Hollzer set forth in the Memorandum of Conclusions. The items named in appellee's brief were perhaps mentioned incidentally only, and as having some tendency to support appellant's argument which was based upon the aforesaid grounds which appellee neither in the trial court nor on appeal has met with any substantial answer, and the straw-man device employed by appellee will hardly distract attention from them.

### Plaintiff's Exhibit 2.

Just before the "conclusion" in appellee's brief, it is pointed out that Plaintiff's Exhibit 2 fails to mention "producing equipment or facilities." suggesting that this is final and conclusive evidence that appellant did not expect to purchase such property as well casings. Again appellee has overlooked the true picture. Said Exhibit 2 uses other language to express the same stipulation which Mr. Paradise, appellee's attorney, placed in the written contract, which is "all of the equipment and facilities." Mr. Ferer's language in Plaintiff's Exhibit 2 is, "and all other materials," etc., and the fact that defendant's authorized agent so understood this language and did not then intend to retain the casings is established by Plaintiff's Exhibit 3 in which defendant, through H. H. Kelly, accepted the offer made in Plaintiff's Exhibit 2, using the equally all-inclusive term "and other material and equipment belonging to Richfield, located on our Soladino lease in Casmalia, with the following exceptions," which exceptions fail to name well casings.

The written contract follows the foregoing offer and acceptance in substance but in greater detail, and exactness

of expression, and in the phraseology of the lawyer, Mr. Paradise. The nearest approach to a prior contract which the record reveals is found in Plaintiff's Exhibits 2 and 3 and they preclude and belie the findings of mistake by one party, suspected by the other, and prove that the contract of January 17th was deliberately so drawn as to convey the well casings and that such was and had always been the intention of the defendant. Appellant's counsel are more fully convinced, after studying the reply brief than before, that the judgment should be reversed with direction to the lower court to set aside and grant plaintiff's motion for summary judgment and to set aside all orders which interfere or conflict with this procedure.

### Conclusion.

By reason of the inadequacy of appellee's reply brief in its attempt to sustain the judgment herein or to overcome appellant's attacks thereon as set forth in the opening brief added assurance that such attacks are meritorious is provided. It would have been an almost endless task to note every inaccuracy or fallacy in the reply brief.

Perhaps the most obvious error in the appellee's contention that appellant was not prejudiced by the denial of its motion for summary judgment and the order dismissing the declaratory relief count has not been mentioned. The reason advanced by appellee for this claim is that everything involved in the decision by these orders was adjudicated after the trial. The fallacy of this reason necessarily results from the fact that had the court erroneously made said orders there would have been no trial and judgment must have been rendered in effect quieting appellant's title to the well casings and affording other relief incidental thereto. It seems that appellee's

brief exhibits certain erroneous concepts in which the trial court also apparently indulged. It is quite certain that this type of error in respect to the nature and scope of relief authorized by the Federal Declaratory Judgments Act, otherwise the court would not have dismissed the declaratory relief count of the amended complaint, because it certainly had jurisdiction to entertain the cause of action therein set forth, and when a statute confers jurisdiction upon a court it is the court's duty to exercise it. (1 Cal. Jur. pp. 587, 588.)

Appellee has much to say in this behalf and upon other issues concerning the court's discretion, which it is said appellate courts are loathe to review and will only do so in clear instances of abuse of discretion. This is undoubtedly another subject upon which appellee and the trial court have misconceived the law. It was declared in *Miller v. Carr*, 116 Cal. 378, that a court's discretion "is not a mental discretion to be exercised *ex gratia* but a legal discretion to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice. In a plain case discretion has no office to perform, and its exercise is limited to doubtful cases where an impartial mind Resitates."

In *Cargnani v. Cargnani*, 16 Cal. App. 96, 102, language is used to the same effect and Chief Justice Marshall's opinion in *Osborn v. United States Bank*, 22 U. S. 738, is quoted which announces the same principle. In the *Cargnani* case no statute directed that the wife be allowed costs on appeal, but it was held that the trial court abused its discretion in not ordering the husband to provide such costs. In *Sharon v. Sharon* an allowance of counsel fees to pay the wife's six lawyers was held an

abuse of discretion, and it was said: The discretion of the court below is a legal discretion, to be reasonably exercised. "Abuse of discretion" in making such orders does not necessarily imply a willful abuse, or intentional wrong. In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason—all the circumstances before it being considered. In the instant case the declaratory judgment count set forth "a plain case" for the relief provided by law. Hence the Court had no discretion to exercise. It is elementary that an inference is a conclusion which may *reasonably* be drawn from proven facts. The Court, therefore, had no discretion to exercise and abused its discretion, if any is contemplated in such matters, in the inference drawn in many of the probative findings; for example, the inference that because the parties had carried on negotiations for several weeks, they must have entered into an oral agreement which the written agreement was intended to embody. It was Blackstone who defined law as the soul of reason. Certain it is that to draw an arbitrary, conjectural inference not founded upon reason or logic, is not an exercise of a legal function.

Upon each and all of the grounds set forth heretofore appellant prays that the judgment herein be reversed with appropriate instructions to the lower court.

Respectfully submitted,

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